SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 502

RAYMOND DENNIS, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the District of Colorado		
Indictment	3	1
Arraignment and plea	8	6
Motion to dismiss	8	7
Memorandum opinion, Knous, Ch. J. and order denying motion to dismiss	13	8
Motion on retrial for renewal of motions filed prior to first trial	30	16
Stipulation as to second trial	32	17
Motion for judgment of acquittal	38	20
Motion in arrest of judgment	38	20
Motion for a new trial	39	21
Judgment and commitment as to Raymond Dennis	40	22
Judgment and commitment as to Irving Dichter	41	23
Judgment and commitment as to Harold Sanderson	42	24

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JANUARY 31, 1966

Received in Clerk's Office from printer February 21, 196

	Original	Print
Record from the United States District Court for the District of Colorado—Continued		
Judgment and commitment as to Albert Skinner	43	25
Judgment and commitment as to Maurice E. Travis	44	26
Judgment and commitment as to Charles H. Wilson	45	27
Notice of appeal	46	28
Order denying motions for judgment of acquittal, in arrest of judgment and for new trial	49	30
Transcript of proceedings In Chambers, August 26, 1963	49	31
Colloquy on renewal of motions and denial thereof	49	31
Transcript of proceedings, August 29, 30 and September 4-9, 1963	68	32
Testimony of Ralph W. Locke, Jr.—direct	68	32
Motion to produce grand jury testimony of Locke, colloquy between court and counsel and denial of motion	106	64
Court's rulings on motions to produce	109	66
Testimony of Ralph W. Locke, Jr.—cross	112	67
Stipulation and colloquy re death of William Mason, witness on first trial	129	88
Objections on second trial to admission of Mason testimony	155	89
Court's ruling on second trial admitting Mason testimony	219	91
Part of Government's Exhibit No. 2 read to the jury	219	92
Part of Government's Exhibits Nos. 4 and 5 read to the jury	267	101
Colloquy between Court and counsel	276	111
Testimony of William Mason (read)—direct	280	115
Colloquy between Court and counsel	322	159

	Original	Print
Record from the United States District Court for the District of Colorado—Continued		
Transcript of proceedings, August 29, 30 and September 4-9, 1963—Continued		
Motions on first trial to produce grand jury testimony of Mason, colloquy and ruling	346	176
Part of Government's Exhibit No. 9 read to the jury	349	177
Testimony of William Mason (read)—		
cross	351	179
Renewal of motions on first trial, after cross-examination, to produce grand jury testimony of Mason, voir dire, colloquy and ruling	392	198
Testimony of Bobby G. Fikes—		
direct	425	207
Alton Lawrence—		
direct	454	229
Motions to produce grand jury testimony of Fikes, colloquy and ruling thereon	494	256
Testimony of Bobby G. Fikes—		
(resumed)—		
cross	532	257
redirect	542	269
recross	542	270
redirect	543	271
Fred L. Gardner—		
direct	551	272
Renewal of motion after cross-examinations to produce grand jury testimony of Fikes, colloquy and ruling thereon	581	309
Motions to produce grand jury testimony of Gardner, colloquy and ruling thereon	617	309
Transcript of proceedings, September 10, 11, 13 and 19, 1963		
Renewal of motions, after cross-examination, to produce grand jury testimony of Gardner, colloquy and ruling thereon	645	312
Part of Government's Exhibit No. 16 read to the jury	645	312

	Original	Print
Record from the United States District Court for the District of Colorado—Continued		
Transcript of proceedings, September 10, 11, 13 and 19, 1963—Continued		
Offers in evidence	646	313
Court's instructions to the jury	671	316
Testimony of Mrs. Eleanor Fernandez—direct	771	317
Offer of proof with respect to Defendants' Exhibits Nos. Q-1–Q-5, inclusive, for identification	792	321
Court's instructions to the jury	1003	323
Objections to the instructions	1031	350
Defendants' requested Instructions Nos. 6 and 7 and refusals by the Court	1120	350
Government's Exhibit No. 1—Resolution dated April 8, 1948	1135	351
Defendants' Exhibits B, C, D, E, G—Expense Vouchers of Ralph W. Locke	1136	353
Defendants' Exhibits Q-1–Q-5 inclusive—Expense Account Records for Irving Dichter	1162	379
Proceedings in the United States Court of Appeals for the Tenth Circuit	1167	384
Minute entry of argument and submission	1167	384
Opinion, Murrah, Ch. J.	1168	384
Judgment in Dennis v. United States and note re other judgments	1196	404
Petition for rehearing	1198	405
Supplement to the petition for rehearing	1207	413
Second supplement to the petition for rehearing	1212	417
Letter from Assistant United States Attorney to Clerk, U.S.C.A., 10th Circuit, dated June 10, 1965	1216	420
Appellee's memorandum in opposition to supplement to petition for rehearing	1218	422
Order denying petition for rehearing	1224	425
Note re stay of mandate	1224	425
Clerk's certificate (omitted in printing)	1225	425
Order extending time to file petition for writ of certiorari	1226	426
Order allowing certiorari	1227	427

[fol. 3]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, Plaintiff,

vs.

ALBERT PEZZATI, RAYMOND DENNIS, IRVING DICHTER, GRAHAM DOLAN, JAMES DURKIN, ASBURY HOWARD, ALTON LAWRENCE, JACK C. MARCOTTI, CHASE J. POWERS, HAROLD SANDERSON, ALBERT SKINNER, MAURICE E. TRAVIS, JESSE R. VAN CAMP, CHARLES H. WILSON, Defendants.

No. 15124, Criminal

INDICTMENT—Filed November 16, 1956

Vio. Title 18, U. S. C. Section 371

The grand jury charges:

That beginning on or about the 15th day of June 1949, and continuing up to and including the date of the return of this indictment, within the District of Colorado and elsewhere, ~~Albert Pezzati~~, Raymond Dennis, Irving Dichter, ~~Graham Dolan~~, ~~James Durkin~~, ~~Asbury Howard~~, ~~Alton Lawrence~~, ~~Jack C. Marcotti~~, ~~Chase J. Powers~~, Harold Sanderson, Albert Skinner, Maurice E. Travis, Jesse R. Van Camp and Charles H. Wilson, the defendants herein, who were then and there officials and employees of the International Union of Mine, Mill and Smelter Workers, which was a labor organization within the meaning of the Labor Management Relations Act of 1947 (29 U.S.C. 152 (5)), and who were then and there members of and affiliated [fol. 4] with the Communist Party, did wilfully, knowingly and unlawfully combine, conspire and agree with each other, and with Arthur Bary, John Williamson, Gil Green and Fred Fine, co-conspirators but not defendants herein, and

with other persons to the Grand Jurors unknown, to defraud the United States and an agency thereof, that is to say, the defendants conspired as aforesaid to fraudulently effectuate, for and on behalf of said Union and its constituent units, a compliance with section 9(h) of the Labor Management Relations Act of 1947 (29 U.S.C. 159(h)), by means of false and fraudulent statements and representations to be made and caused to be made by said defendants to the National Labor Relations Board, which was and is an agency of the United States, and to fraudulently obtain and use for and on behalf of said Union and its constituent units, the services and facilities of said Board without lawfully and in good faith qualifying said Union for the use of said services and facilities under section 9(h) of said Act, and to impair, pervert, frustrate and defeat the proper, lawful and effective administration of said Act by the National Labor Relations Board.

It was a part of the conspiracy that said defendants would hold and continue to hold positions of power, influence and control in the aforesaid Union, that is to say, they would hold and continue to hold positions as International officers, International Executive Board members, staff members, and International Representatives in the said Union, that the said defendants would be and continue to be members of the Communist Party and in collaboration with aforesaid co-conspirators who were functionaries of the Communist Party, but not officials, employees or members of said Union, would dominate and control and continue to dominate and control the affairs and policies of said Union.

It was a further part of the conspiracy that the said defendants would file and cause to be filed annually and at other times with the National Labor Relations Board affidavits commonly known as Non-Communist affidavits, executed respectively by the defendants ~~Albert Pezzati~~, Raymond Dennis, Irving Dichter, ~~Alton Lawrence~~, ~~Chase J. Powers~~, Maurice E. Travis, Jesse R. Van Camp, ~~Asbury~~

Howard and Charles H. Wilson, who were officers of said Union, and also were members of and affiliated with the Communist Party, which said affidavits would falsely and fraudulently represent to said National Labor Relations Board that said Union officers were not members of and were not affiliated with the Communist Party, and that said Union officers would pretend to resign from their membership in the Communist Party and pretend to terminate their affiliation with said Party, but would in fact continue their membership in and affiliation with the same. [fol. 5] It was a further part of the conspiracy that the said defendants would by the means aforesaid fraudulently induce the National Labor Relations Board to issue to the said Union certificates of compliance with section 9(h) of the aforesaid Act, and said Union would, thus, fraudulently obtain from said Board the authorization and right to make use of said Board's services and facilities, that is to say, the authorization and right to have the name of said Union appear on ballots in elections conducted by said Board to determine the exclusive bargaining agent for groups and units of employees, the authorization and right to prosecute charges of unfair labor practices before said Board and the authorization and right to make use of the services and facilities of said Board in proceedings for the establishment of what is commonly known as a closed shop.

It was a further part of the conspiracy that the said defendants, well knowing the false and fraudulent character of the aforesaid affidavits and the fraudulent character of the said Union's compliance with section 9(h) of said Act, would use the services and facilities of the National Labor Relations Board for and on behalf of said Union and its constituent units, that is to say, they would file petitions requesting said Board to conduct elections for the purpose of determining the exclusive bargaining agents for groups and units of employees, would intervene in cases where such petitions were filed by other labor organizations, would appear at and participate in hearings conducted by said Board in respect to said petitions, would induce said Board

to place the name of said Union on the ballots in elections ordered and conducted by said Board, and would participate in said elections and conduct election campaigns for the purpose of inducing employees to vote for said Union and winning said elections, so that said Board would certify said Union as the exclusive bargaining agent for said employees; that said defendants would file complaints with said Board relating to unfair labor practices, would appear and participate in hearings conducted by said Board in respect to the same ~~and would utilise the procedure of said Board for the establishment of a closed shop, and would appear and participate in hearings conducted by said Board in respect to complaints and petitions filed by employers~~.

Overt Acts

The grand jury further charges, that in furtherance of the aforesaid conspiracy and to accomplish the objects thereof, the defendants committed numerous overt acts, among which were the following:

[fol. 6] 1. On or about July 19, 1949, at Chicago, Illinois, ~~Albert Pezzati~~, Jesse R. Van Camp, ~~Chase J. Powers~~, Charles H. Wilson, and Harold Sanderson, ~~and Graham Dolan~~ attended and participated in a meeting of the International Executive Board of said Union.

2. On or about August 8, 1949, at Washington, D.C., ~~Albert Pezzati~~, Maurice E. Travis, ~~Chase J. Powers~~, Jesse R. Van Camp, and Charles H. Wilson, filed false affidavits with the National Labor Relations Board.

3. On or about December 21, 1949, at Cuyahoga County, Ohio, Raymond Dennis executed a false affidavit.

4. On or about May 19, 1950, at Danville, Illinois, Raymond Dennis and Jesse R. Van Camp signed an agreement for an election before the National Labor Relations Board.

~~5. On or about July 25, 1950, at Roane County, Tennessee, Alton Lawrence executed a false affidavit~~.

6. On or about December 15, 1950, at Washington, D.C., ~~Albert Penzati~~, Maurice E. Travis, ~~Chase J. Powers~~, ~~Alton Lawrence~~ and Raymond Dennis filed false affidavits with the National Labor Relations Board.

7. On or about April 18, 1951, at Salt Lake City, Utah, Albert Skinner appeared at and participated in a hearing conducted by the National Labor Relations Board.

8. ~~On or about July 26, 1951, at Los Angeles, California, Jack C. Marcotti filed a false affidavit with the National Labor Relations Board.~~

9. ~~On or about October 26, 1951, at Birmingham, Alabama, Alton Lawrence filed a petition with the National Labor Relations Board.~~

10. On or about November 19, 1952, at Cuyahoga County, Ohio, Raymond Dennis executed a false affidavit.

11. On or about December 3, 1952, at Denver, Colorado, Charles H. Wilson executed a false affidavit and caused the same to be mailed to the National Labor Relations Board at Washington, D.C.

[fol. 7] 12. On or about November 6, 1953, at Denver, Colorado, Maurice E. Travis executed a false affidavit and caused the same to be mailed to the National Labor Relations Board at Washington, D.C.

13. ~~On or about August 24, 1953, at Los Angeles, California, Jack C. Marcotti filed a petition with the National Labor Relations Board.~~

14. On or about February 15, 1954, at Butte, Montana, Albert Skinner appeared at and participated in a hearing conducted by the National Labor Relations Board.

15. On or about March 24, 1954, at Kingston, Tennessee, Charles H. Wilson appeared at and participated in a hearing conducted by the National Labor Relations Board.

16. On or about September 17, 1954, at Charleston, South Carolina, Alton Lawrence appeared at and participated in a hearing conducted by the National Labor Relations Board.

17. On or about October 19, 1954, at Denver, Colorado, Albert Pezzati, Maurice E. Travis, Raymond Dennis, Asbury Howard, Chase J. Powers and Alton Lawrence executed false affidavits and each of the said affidavits were sworn to before Harold Sanderson, who acted as Notary Public.

18. On or about February 24, 1955, at New York, N.Y., Irving Dichter executed a false affidavit.

19. On or about June 23, 1955, at Denver, Colorado, Albert Pezzati executed a false affidavit and swore to the same before Harold Sanderson, who acted as Notary Public.

20. On or about August 11, 1955, at Seattle, Washington, Chase J. Powers filed a petition with the National Labor Relations Board.

21. On or about March 28, 1955, at Chicago, Illinois, James Durkin appeared at and participated in a hearing conducted by the National Labor Relations Board.

[fol. 8] All in violation of Section 371, Title 18 U.S.C.

A true Bill,

Charles Lewis Sayre, Foreman.

Donald E. Kelley, United States Attorney.

In United States District Court

Arraignment and Plea—November 20, 1956

On the 20th day of November, 1956, The United States of America appeared by Donald E. Kelley, United States Attorney and all the defendants appeared in person and by their counsel, Nathan Witt, Esq., and Eugene Deikman, Esq., before the Honorable Jean S. Breitenstein, Judge of the United States District Court for the District of Colo-

rado, and the defendants waived the reading of the indictment, and each entered his respective plea of not guilty to the one count in the Indictment, and it is ordered that the defendants have to January 14, 1957 to file motions.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed January 14, 1957

The defendants move that the indictment herein be dismissed on the following grounds:

1. The Grand Jury was not selected, drawn or summoned in accordance with law, for the reasons that:

(a) There has been a systematic exclusion by the Clerk and Jury Commissioner of Negroes, Mexicans and other racial or minority groups.

(b) There has been a systematic exclusion of manual workers and wage earners.

(c) The representation of Negroes, Mexicans, other racial or minority groups, manual workers and wage earners has been limited to token representation.

(d) The Grand Jury has been weighted in favor of and dominated by representatives of the owner-manager groups of the community.

[fol. 9] (e) The Clerk has failed to carry out the statutory and constitutional mandate to employ such methods and procedures as would insure a representation of a cross-section of the community.

2. Section 371 of Title 18 and Section 159(h) of Title 29 of the U.S. Code are unconstitutional on their face and as applied to the defendants, and in particular violate Article I, Section 9, clause 3, and the First, Fifth, Ninth and Tenth Amendments to the Constitution.

3. The indictment does not state facts sufficient to constitute an offense against the United States.

4. The overt acts alleged in the indictment are not acts to effect the object of the conspiracy, within the meaning of Section 371 of Title 18 of the U.S. Code.

5. The first thirteen overt acts alleged in the indictment are barred by the Statute of Limitations, Section 3282 of Title 18 of the U.S. Code.

6. The indictment is vague and indefinite and fails to inform the defendants adequately of the offense charged so as to enable them to make their defense.

Montfort, Wilson & Deikman, By Eugene Deikman, Nathan Witt, Attorneys for Defendants.

[fol. 13]

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION AND ORDER DENYING MOTION TO DISMISS—March 27, 1958

KNOUS, Chief Judge.

The defendants have interposed a motion to dismiss the Indictment. Extended oral arguments on the motion were heard following which the parties were requested by the Court to submit memoranda on the points and authorities upon which they relied. While several alleged grounds for dismissal were enumerated in the motion, the arguments and memoranda submitted by counsel primarily have been directed to the contention of the defendants that the Indictment does not state facts sufficient to constitue an offense against the United States.

The indictment charges conspiracy to defraud the United States. It covers the period from June 15, 1949, to the date of the return of the indictment, November 16, 1956. The defendants are fourteen officials and employees of the International Union of Mine, Mill and Smelter Workers, a labor organization within the meaning of the Labor Management Relations Act of 1947 (29 U.S.C. 152(5)). The charge is that the defendants were members of and affiliated with the

Communist Party and conspired with each other and with other persons both named and unknown:

(1) Fraudulently to effectuate on behalf of the Union a compliance with section 9(h) of the Labor Management Relations Act of 1947 by means of false and fraudulent statements made to the National Labor Relations Board, an agency of the United States;

(2) Fraudulently to obtain and use for the Union the services and facilities of the Board without a good faith qualification of the Union, and

(3) To pervert and defeat the proper administration of the 1947 Act by the Board.

The indictment asserts, inter alia, that as a part of the conspiracy the defendants would:

(1) File with the Board non-Communist affidavits which would falsely and fraudulently represent that certain Union officers were not members of and affiliates with the Communist party;

(2) Fraudulently induce the Board to issue to the Union certificates of compliance with section 9(h) of the 1947 Act and fraudulently obtain from the Board the right to make use of the services and facilities of the Board;

[fol. 14] (3) With knowledge of the false and fraudulent character of the affidavits and of the fraudulent compliance with section 9(h), use the services and facilities of the Board on behalf of the Union.

The indictment alleges twenty-one overt acts. The first in point of time is said to have occurred on July 19, 1949, and the last on August 11, 1955.

Section 9(h) of the Labor Management Relations Act of 1947 (29 U.S.C. 159(h)) reads:

"No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued

pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits."

Section 35A of the Criminal Code referred to in the above-quoted statute was repealed by the Act of June 25, 1948, 62 Stat. 862, and is now covered by various sections of Title 18 U.S.C. Of these, only 18 U.S.C. §1001 is pertinent. It provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The indictment charges a violation of 18 U.S.C. §371 which, so far as pertinent, provides:

[fol. 15] "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The position of the Government is that the indictment charges a conspiracy "to defraud the United States" and not a conspiracy to commit offenses.

Hence, the argument of defense counsel that the indictment is insufficient to state an offense under the conspiracy to commit offenses clause of section 371, supra, need not be considered since, as has been stated, the Government relies solely on the sufficiency of the indictment to charge a conspiracy to defraud the United States.

The fraud on the United States is alleged by the Government to be the use of the facilities and services of the Board for the Union after the fraudulent compliance with section 9(h) by filing of the non-Communist affidavits required by section 9(h) of the 1947 Act. As noted above, this section provides that before a union has certain rights under the Act affidavits must be filed with the Board stating that union officers are free from membership in or affiliation with the Communist Party.

Section 9(h) does not violate the federal Constitution (American Communication Association v. Douds (1950), 339 U.S. 382). As stated by the United States Supreme Court, the purposes of section 9(h) are:

(1) "to protect the public not against what Communists • • • advocate or believe, but against what Congress has concluded they have done and are likely to do again" (American Communications Association v. Douds, supra, p. 396).

(2) to "wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government" (National Labor Relations Board v. Highland Park Co. (1951), 341 U.S. 322, 325);

(3) "to stop the use of the Labor Board by union leaders unwilling to be limited in government by the processes of [fol. 16] reason" (National Labor Relations Board v. Dant (1953), 344 U.S. 375, 385).

Upon their voluntary compliance with the conditions prescribed, section 9(h) makes available to labor organizations the benefits and advantages arising from

(1) the Board's investigation of questions raised by labor organizations concerning the representation of employees, and

(2) the Board's issuance of complaints pursuant to a charge made by a labor organization (United Mine Workers v. Arkansas Oak Flooring Co. (1956), 351 U.S. 62, 70, 73).

These rights are of the utmost importance to trade unions. As said in American Communications Association v. Douds, supra, p. 390:

"The fact is that §9(h) may well make it difficult for unions to remain effective if their officers do not sign the affidavits."

Section 9(h) makes Section 35A of the Criminal Code applicable to the required affidavits. In Leedom v. International Union of Mine, Mill and Smelter Workers (1956), 352 U.S. 145, and Amalgamated Meat Cutters, etc. v. National Labor Relations Board (1956), 352 U.S. 153, it was held that (352 U.S. 156):

"* * * the sole sanction for the filing of a false affidavit under §9(h) is the criminal penalty imposed on the officer who files a false affidavit, not decompliance of the union nor the withholding of the benefits of the Act that are granted once the specified officers file their §9(h) affidavits."

The prosecution here is for conspiracy to defraud in violation of the general conspiracy statute, section 371. It is not a prosecution under section 1001, the false statements statute. In Leedom v. International Union of Mine, Mill and Smelter Workers, supra, p. 148, the Court said, with reference to section 9(h):

"We start with a statutory provision that contains only one express sanction, viz., prosecution for making a false statement."

The first question is whether a prosecution under section 371 may be maintained. Section 9(h) does not expressly repeal section 371. It is a cardinal rule of construction that repeals by implication are not favored (United States

v. Borden (1939), 308 U.S. 188, 198). Where Congress by more than one statute proscribes a private course of [fol. 17] conduct, the Government may choose to invoke either applicable law (Rosenberg v. United States (1953), 346 U.S. 273, 294). The existence of a specific criminal statute or a reference thereto such as appears in section 9(h) does not preclude prosecution under other applicable statutes (cf. Edwards v. United States (1941), 312 U.S. 473, 483-484; United States v. Gilliland (1941), 312 U.S. 86, 95-96; Wallenstein v. United States (1928), 3 Cir., 25 F.(2d) 708). As I read Leedom v. International Union, supra, it does not preclude a prosecution under section 371 for conspiracy to defraud the United States by preverting the lawful function of the Board by means of deceit and chicanery.

Defendants argue that fraud is not an essential element of an offense covered by section 1001 and that a conspiracy to commit a statutory offense of which fraud is not an essential element is punishable only under the offense clause of section 371. From these premises they conclude that this indictment admittedly based upon the conspiracy to defraud clause of section 371 must fall. Defendants cite numerous cases arising under the Wartime Suspension of Limitations Act (18 U.S.C. §3287) and comparable statutes. These statutes, among other things, extended the period of limitations applicable to offenses involving any fraud or attempted fraud against the United States. There provisions have been determined to apply only to offenses involving a fraud of a pecuniary nature or to offenses of which fraud is an essential ingredient (Bridges v. United States (1953), 346 U.S. 209, 221—conspiracy to defraud by false statement in naturalization proceeding; United States v. Grainger (1953), 346 U.S. 235, 244—conspiracy to defraud by false claims; United States v. Scharton (1932), 285 U.S. 518, 521—income tax evasion; United States v. McElvain (1926), 272 U.S. 633, 638—conspiracy to defraud by false income tax returns; United States v. Noveck (1926), 271 U.S. 201, 203—perjury; Marzani v. United States (1948), C.A.D.C., 168 F. (2d) 133, 135-137, affirmed without opinion by equally divided court, 335 U.S. 895, 336

U.S. 922—False Claims Act; United States v. Obermeier (1950), 2 Cir., 186 F. (2d) 243, 256-257, certiorari denied 340 U.S. 951—false statement in naturalization proceedings; United States v. Klinger (1952), 2 Cir., 199 F.(2d) 645, affirmed by equally divided court, 345 U.S. 979—conspiracy to defraud by obstructing the lawful functioning of the Office of Price Administration in the rationing of sugar; United States v. Lurie (1955), 7 Cir., 222 F.(2d) 11, 13-15, certiorari denied 350 U.S. 835—conspiracy to defraud by false statements made to War Assets Corporation and War Assets Administration in connection with administration of sale of surplus property under the Surplus Property Act of 1944; cf. United States v. Showalter (1952), D.C.N.D. California, 103 F. Supp. 806—violation of Servicemens' Dependents Allowance Act).

[fol. 18] These cases merely hold that for the suspension of limitations acts to be effective there must be an offense involving a pecuniary loss or an offense of which fraud is an essential ingredient. In none of those cases is there a holding that the indictment or information then under consideration failed to state an offense against the United States.

The fallacy of defendants' argument lies in the premise that the indictment here charges a conspiracy to commit a statutory offense (violation of section 1001) of which fraud is not an essential element. I do not so read the indictment. The charge here is conspiracy to defraud the United States by fraudulently effectuating a compliance with section 9(h), by fraudulently obtaining for the Union the use of the facilities of the Board, and by perverting and defeating the administration of the 1947 Act by the Board. The use of allegedly false non-Communist affidavits was only an incident of the conspiracy.

In a conspiracy charge the conspiracy is the gist of the offense (Braverman v. United States (1942), 317 U.S. 49, 54). This prosecution is not laid under section 1001. The question of whether fraud is an essential element of an offense under section 1001 is immaterial. Instead we have the question of whether the indictment sufficiently charges, under section 371, conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose."

The statute is broad enough to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of the federal government (Haas v. Henkel (1910), 216 U.S. 462, 479). The phrase "conspire * * * to defraud the United States" includes within its meaning interference with or obstruction of one of the functions of the federal government by deceit, craft, trickery, or dishonesty (Hammerschmidt v. United States (1924), 265 U.S. 182, 188).

Defendants rely heavily on Bridges v. United States, supra. As I read that decision, it does not support their arguments. The Bridges case specifically recognizes Haas v. Henkel and Hammerschmidt v. United States (see 346 U.S. 221, note 19), and points out that those cases refer to conspiracies to defraud in violation of the second clause of the general conspiracy statute (section 371) and do not control the interpretation of the Wartime Suspension of Limitations Act. In the Bridges case the Court refers to [fol. 19] United States v. Cohn (1926), 270 U.S. 339, which at page 346 distinguishes a conspiracy to defraud under the general conspiracy statute from an offense under the False Claims Act.

Under the Leedom and Amalgamated Meat Cutters cases, supra, the Court held that the Board could not decertify a union because false non-Communist affidavits were filed. Defendants argue from this that as the Board must proceed even in the event of false affidavits, there is no fraud on the Government. In other words, the successful operation of the fraud would deprive the transaction of its fraudulent character. This argument is refuted by its mere statement (United States v. Keitel (1908), 211 U.S. 370, 394).

In the Leedom case it was said (352 U.S. 148):

"The filing of the required affidavits by the necessary officers is the key that makes available to the union the benefits of the Act."

While it may be that so far as the Board is concerned a false key is just as adequate as a true key, the persons who

use that false key to unlock the door and obtain for the union benefits to which the union would not otherwise be entitled thereby defeat the purposes which the United States Supreme Court has said that Congress intended to effectuate by section 9(h). The indictment herein adequately charges a conspiracy to defraud the United States by the impairment, obstruction, and defeat of a lawful function of the Board. In my opinion, it sufficiently states an offense against the United States.

In the opinion of the Court the other grounds for dismissal of the indictment set forth in defendants' motion are without merit. Wherefore, it is

Ordered And Adjudged that the motion of the defendants to dismiss the indictment be, and the same hereby is denied. It is

Further Ordered that the supplemental motion to dismiss, filed by defendants on February 4, 1958, is also denied and overruled.

Dated at Denver, Colorado, this twenty-seventh day of March, A.D. 1958.

William Lee Knous, Chief Judge.

[fol. 30]

IN UNITED STATES DISTRICT COURT

MOTION ON RETRIAL FOR RENEWAL OF MOTIONS FILED PRIOR TO FIRST TRIAL—Filed August 26, 1963

The defendants hereby renew on retrial the motions filed prior to the first trial, as follows:

a. Motion to Dismiss the Indictment on five stated grounds, filed January 14, 1957;

b. Motion of the defendant Travis for Severance and Continuance, filed October 21, 1959;

c. Motion of the defendants other than Travis for Severance of their trial from the trial of the defendant Travis, filed October 21, 1959;

[fol. 31] d. Motion on the order of presentation of evidence by the prosecution, filed November 3, 1959; and

e. Motion for the exclusion of evidence relating to events prior to June 15, 1949, or in the alternative for exclusion of evidence relating to events prior to June 23, 1947, filed November 3, 1959.

2. Defendants respectfully move this Court to consider, in determining these motions, the arguments, representations, affidavits, etc., presented to this Court at the time these motions were originally offered, together with such further argument and representation as the defendants shall now present in support of the renewal of these motions.

Wherefore, the defendants respectfully move this Court for Orders as follows:

a. An Order dismissing the indictment; or, if the Motion to Dismiss not be granted,

b. An Order severing the trial of defendant Travis from the trial of the other defendants in this case; and

c. Orders directed to the prosecution in accordance with and in execution of the motions with respect to prosecution evidence filed November 3, 1959.

Respectfully submitted,

George J. Francis, Telford Taylor, Nathan Witt,
Attorneys for Defendants.

[fol. 32]

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO SECOND TRIAL—August 26, 1963

This stipulation is entered into this 26th day of August, 1963, by and between George J. Francis, Telford Taylor

and Nathan Witt, counsel for the defendants, and Lawrence M. Henry, United States Attorney for the District of Colorado, and Lafayette E. Broome of the Department of Justice, for the purpose of expediting and simplifying the trial of the captioned case and of establishing a method for the introduction into evidence of certain documents without the necessity of producing witnesses for such purposes. Counsel for the Government and for the defendants reserve only the right to object to the relevancy, materiality and competency of said documents.

[fol. 33] 1. It is agreed that all of the non-Communist affidavits (National Labor Relations Board Form 1081) obtained from the National Labor Relations Board, on which appear the names of Raymond Dennis, Irving Dichter, Harold Sanderson, Maurice E. Travis (signed M. E. Travis), Charles H. Wilson and Jesse R. Van Camp, defendants herein, either as affiant or as Notary Public, are authentic and were signed and executed by the persons whose names so appear, at the times and at the places respectively indicated therein, and were forwarded and caused to be forwarded by the said defendants to the National Labor Relations Board at Washington, D.C.

2. It is further agreed that the files and records of the National Labor Relations Board pertaining to cases in which the International Union of Mine, Mill and Smelter Workers, or any of its local unions, or any of the defendants herein, participated are authentic and may be received in evidence without further identification, subject only to objection for relevancy, materiality and competency. In addition, a list of all such cases from the time of said Union's compliance in 1949 until the date of the indictment returned herein, which was prepared by the National Labor Relations Board prior to the previous trial of this case and was submitted to counsel for the defendants before said trial, may be received in evidence in the retrial of this case, subject however to inspection of the same and any objection for materiality, relevancy, and competency.

3. It is further agreed that correspondence and copies of correspondence between the National Labor Relations Board and the International Union of Mine, Mill and Smelter Workers, or any of the defendants herein, obtained from files of said Board, are authentic, and may be received in evidence, subject only to objection to relevancy, materiality and competency.

4. It is further agreed that copies of the minutes of meetings of the Executive Board of the International Union of Mine, Mill and Smelter Workers, copies of reports of the various convention proceedings of said Union, copies of the Mine-Mill Union (official publication of said Union), and copies of expense vouchers submitted by staff members of said Union are authentic records made and kept by the said Union in the usual course of its business and may be received in evidence without further identification, subject only to objection to relevancy, materiality, and competency.

[fol. 34] 5. The Government intends to offer in evidence at the trial of the above defendants and defendants may also offer the same exhibits received by the Court in the previous trial, which began on November 2, 1959 at Denver, Colorado. It is, therefore, agreed that photostatic copies which were substituted for the original exhibit in the original trial may be received in evidence without the necessity of producing the originals, subject to objection on grounds of relevancy, materiality, and competency.

6. In the event that the Government or defendants should decide to offer additional documents at the scheduled trial of this cause, it is agreed that a list thereof shall be furnished to opposing counsel at a reasonable time prior to their offer in evidence, so that counsel may be allowed sufficient time within which to inspect the same.

(Illegible); Lawrence M. Henry, United States Attorney; Lafayette E. Broome, Attorney, Department of Justice; George J. Francis, Attorney for

Defendants; Telford Taylor, Attorney for Defendants; Nathan Witt, Attorney for Defendants.

Filed August 26, 1963.

[fol. 38]

IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT OF ACQUITTAL—
Filed October 2, 1963

Come now the defendants, by their attorneys, and move this Honorable Court, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, to enter a judgment of acquittal for each defendant of the offense or offenses charged in this indictment, on the grounds that (a) prosecution for these offenses is barred by the Statute of Limitations, and (b) the evidence is insufficient to sustain the conviction of any defendant for such offense or offenses.

Respectfully submitted,

Telford Taylor, Nathan Witt, George J. Francis, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

MOTION IN ARREST OF JUDGMENT—Filed October 2, 1963

Come now the defendants, by their attorneys, and move this Honorable Court, pursuant to Rule 34 of the Federal Rules of Criminal Procedure, to arrest judgment against each defendant, on the grounds that the indictment does not state facts sufficient to constitute an offense against the United States, that it is duplicitous, vague, and uncertain, that the Court was without jurisdiction of the offense or offenses charged, that Section 371 of Title 18 and Section 159 (H) of Title 29 of the United States Code are unconstitutional on their face and as applied to the defendants, and that the facts alleged in the indictment do not consti-

tute the offense of conspiring to defraud the United States or any agency thereof, as charged in the indictment.

Respectfully submitted,

Telford Taylor, Nathan Witt, George J. Francis, Attorneys for Defendants.

[fol. 39]

IN UNITED STATES DISTRICT COURT

MOTION FOR A NEW TRIAL—Filed October 2, 1963

Come now the defendants, by their attorneys, and move this Honorable Court, pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure, to grant a new trial for each defendant and as grounds therefor state as follows:

1. The verdict is contrary to the weight of the evidence, is not supported by substantial evidence, and is insufficient to sustain the conviction of any of the defendants for the offense or offenses charged in the indictment;

2. The Court erred in denying the motion of the defendants other than the defendant Maurice Travis for a severance of their trial from the trial of the defendant Travis;

3. The Court erred in denying the motion of the defendant Maurice Travis for a severance;

4. The Court erred in overruling defendants' objections to prosecution testimony that certain meetings were Communist Party meetings, without proper foundation;

5. The Court erred in admitting the testimony of William Mason which he had given on the first trial;

6. The Court erred in admitting documentary evidence and exhibits, and testimonial evidence, to which objections were made by the defendants;

7. The Court erred in sustaining objections to questions addressed to defense witness Eleanor Fernandez and in excluding documentary evidence and exhibits offered by the defendants, all in connection with the defendant Irving Dichter;

8. The Court erred in excluding defendants' Exhibit for Identification "Y", the duly certified list compiled by the National Labor Relations Board showing the dates on which unions complied with Section 9 of the Taft-Hartley Act;

9. The Court erred in refusing to charge the jury as requested by counsel for the defendants, and in charging the jury over the objections of counsel for the defendants;

[fol. 40] 10. The Court erred in denying the defendants' motion with respect to order of proof, the defendants' Motions for production to the Court or to the defendants of the testimony of prosecution witnesses before grand juries, and in the interpretation and application of 18 U.S.C. 3500.

11. The Court erred in denying the defendants' challenge for cause with respect to the alternate juror, Jacqueline Lou Anderson.

Respectfully submitted,

Telford Taylor, Nathan Witt, George J. Francis,
Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT AS TO RAYMOND DENNIS—
November 7, 1963

On this 7th day of November, 1963 came the attorney for the government and the defendant appeared in person and and by his counsel

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the

offense of conspiracy to defraud the government of the United States of America, in violation of 18 USC 371 as charged in the Indictment herein and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of a maximum of three (3) years upon the Indictment herein, said defendant to become eligible for parole at such time as the board of parole may determine, under the provisions of Title 18, USC, Section 4208(a)(2).

It Is Further Adjudged that the defendant pay to the United States of America a fine of $2,000.00, and that the United States of America have execution therefor.

[fol. 41] It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Alfred A. Arraj, United States District Judge,
G. Walter Bowman, Clerk.

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT AS TO IRVING DICHTER—
November 7, 1963

On this 7th day of November, 1963 came the attorney for the government and the defendant appeared in person and by his counsel

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of conspiracy to defraud the government of the United States of America, in violation of 18 USC 371 as charged in the Indictment herein and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of a maximum of three (3) years upon the Indictment herein, said defendant to become eligible for parole at such time as the board of parole may determine, under the provisions of Title 18, U.S.C., Section 4208(a)(2).

It Is Further Adjudged that the defendant pay to the United States of America a fine of $2,000.00, and that the United States of America have execution therefor.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Alfred A. Arraj, United States District Judge; G. Walter Bowman, Clerk.

[fol. 42]

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT AS TO HAROLD SANDERSON—November 7, 1963

On this 7th day of November, 1963 came the attorney for the government and the defendant appeared in person and by his counsel

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of conspiracy to defraud the government of the United States of America, in violation of 18 USC 371 as charged in the Indictment herein and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of a maximum of three (3) years upon the Indictment herein, said defendant to become eligible for parole at such time as the board of parole may determine, under the provisions of Title 18, USC, Section 4208(a)(2).

It Is Further Adjudged that the defendant pay to the United States of America a fine of $2,000.00, and that the United States of America have execution therefor.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Alfred A. Arraj, United States District Judge, G. Walter Bowman, Clerk.

[fol. 43]

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT AS TO ALBERT SKINNER—November 7, 1963

On this 7th day of November, 1963 came the attorney for the government and the defendant appeared in person and by his counsel

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of conspiracy to defraud the government of the United States of America, in violation of 18 USC 371 as charged in the Indictment herein and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of a maximum of three (3) years upon the Indictment herein, said defendant to become eligible for parole at such time as the board of parole may determine, under the provisions of Title 18, U.S.C., Section 4208(a)(2).

It Is Further Adjudged that the defendant pay to the United States of America a fine of $2,000.00, and that the United States of America have execution therefor.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Alfred A. Arraj, United States District Judge,
G. Walter Bowman, Clerk.

[fol. 44]

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT AS TO MAURICE E. TRAVIS—November 7, 1963

On this 7th day of November, 1963 came the attorney for the government and the defendant appeared in person and by his counsel

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of conspiracy to defraud the government of the United States of America, in violation of 18 USC 371 as charged in the Indictment herein and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of a maximum of three (3) years upon the Indictment herein, said defendant to become eligible for parole at such time as the board of parole may determine, under the provisions of Title 18, U.S.C., Section 4208(a)(2).

It Is Further Adjudged that the defendant pay to the United States of America a fine of $2,000.00, and that the United States of America have execution therefor.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Alfred A. Arraj, United States District Judge,
G. Walter Bowman, Clerk.

[fol. 45]

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT AS TO CHARLES H. WILSON—
November 7, 1963

On this 7th day of November, 1963 came the attorney for the government and the defendant appeared in person and by his counsel

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of conspiracy to defraud the government of the United States of America, in violation of 18 USC 371 as charged in the Indictment herein and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of a maximum of three (3) years upon the Indictment herein, said defendant to become eligible for parole at such time as the board of parole may determine, under the provisions of Title 18, U.S.C., Section 4208(a)(2).

It Is Further Adjudged that the defendant pay to the United States of America a fine of $2,000.00, and that the United States of America have execution therefor.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Alfred A. Arraj, United States District Judge,
G. Walter Bowman, Clerk.

[fol. 46]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 8, 1963

The parties who are appealing herein and their respective addresses are as follows: Raymond Dennis, 10512 Lee Avenue, Cleveland, Ohio; Irving Dichter, 1834 Colorado Boulevard, Denver, Colorado; Harold Sanderson, 2076

South St. Paul, Denver, Colorado; Albert Skinner, 1540 Nursery St., Aurora, Colorado; Maurice E. Travis, 3117 Ohio Street, Richmond, California; Charles H. Wilson, 5321 East Fairmount St., Tucson, Arizona.

Their attorneys are Telford Taylor, whose address is 200 Park Avenue, New York New York; Nathan Witt whose address is P.O. Box 156, New York 23, New York; and George J. Francis whose address is 817 Farmers Union Building, Denver 3, Colorado.

On September 20, 1963, after a trial to a jury, the appellants herein were found guilty under an indictment which charged them with violation of Title 18, U.S.C. Section 371. The offense charged in said indictment alleged that these appellants were officials and employees of the International [fol. 47] Union of Mine, Mill and Smelter Workers, a labor organization within the meaning of the Labor Management Relations Act of 1947 (29 U.S.C. 152 (5)), and were also members of and affiliated with the Communist Party. The indictment further alleged that these appellants conspired with each other, and with other named and unnamed persons to defraud the United States and an agency thereof by filing and causing to be filed annually and at other times false Non-Communist affidavits and in furtherance of said conspiracy, committed numerous overt acts.

On November 7, 1963, the District Court entered its Orders denying the motions of these appellants for Judgment of Acquittal, for a New Trial, and in Arrest of Judgment. On November 7, 1963, the following judgments of conviction, fine, and sentences of conviction were imposed: Raymond Dennis, three years imprisonment and two thousand dollar fine; Irving Dichter, three years imprisonment and two thousand dollar fine; Harold Sanderson, three years imprisonment and two thousand dollar fine; Albert Skinner, three years imprisonment and two thousand dollar fine; Maurice E. Travis, three years imprisonment and two thousand dollar fine; Charles H. Wilson, three years imprisonment and two thousand dollar fine.

The appellants herewith appeal to the Court of Appeals for the Tenth Circuit from said Orders, Judgments, Sentences, and Fines.

Dated: November 8, 1963.

Telford Taylor, Nathan Witt, George J. Francis, Attorneys for Appellants.

[fol. 49]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTIONS FOR JUDGMENT OF ACQUITTAL, IN ARREST OF JUDGMENT AND FOR NEW TRIAL—December 30, 1963

This matter having come on to be heard on the 7th day of November, 1963 on the Motions of defendants for Judgment of Acquittal, Arrest of Judgment and New Trial, and the Court having heard arguments of counsel and being fully advised in the premises,

It Is Ordered That,

Defendants' Motion for Judgment of Acquittal be and is hereby denied;

Defendants' Motion In Arrest of Judgment be and is hereby denied;

Defendants' Motion for New Trial be and is hereby denied.

Dated at Denver, Colorado, this 30th day of December, 1963, nunc pro tunc as of November 7, 1963.

By the Court: Alfred A. Arraj, Chief Judge.

IN UNITED STATES DISTRICT COURT

Official Transcript Proceedings in Chambers—Monday, August 26, 1963

Proceedings before the Honorable Alfred A. Arraj, Chief Judge, United States District Court for the District of Colorado, and a Jury of Twelve, in Courtroom A, Main Post Office Building, Denver, Colorado.

* * * * * * *

COLLOQUY ON RENEWAL OF MOTIONS AND DENIAL THEREOF—August 26, 1963

Proceedings in Chambers

The Court: All right, we are ready, if you are, Mr. Taylor, to proceed.

[fol. 50] Mr. Taylor: May it please the Court, the Defense wishes to renew now prior to retrial the motions which have been filed in this case prior to the first trial, those being the motion to dismiss the indictment which was filed on January 14, 1957, the motion by the defendant Travis for severance and continuance filed October 21, 1959, the motion of the other defendants to sever their trial from the trial of Travis filed the same date, October 21, 1959, the motion with respect to the order of presentation of evidence by the prosecution filed November 3, 1959, and the motion in the alternative to exclude evidence prior to June 15, 1949 or in the alternative prior to June 23, 1947, that motion also being filed November 3, 1959.

Now, may it please the Court, we have embodied that motion in writing and it has been served on the United States Attorney and service acknowledged, and I would like to give a copy of the motion to the reporter embodying the record. I think you have copies.

The Court: May I see it?

Mr. Taylor: Your Honor, the motion simply lists those prior motions and asks Your Honor to consider what was

said before, as well as what we say now, in support of them, with appropriate prayers at the end.

Now, if I may run through those with respect to the situation in this Court before and in the Court of Appeals, the motion to dismiss the indictment was primarily based on the question of whether it states an offense, that being a problem that was argued before Judge Breitenstein, and then before Judge Knous, and was decided against the defense, and that question was passed on in the Court of Appeals by adopting Judge Knous' opinion, and therefore we assume Your Honor doesn't want to hear any further argument on that now a[illegible] Your Honor's action would be governed by the Court of Appeals.

Of course, if Your Honor wishes to hear argument, we are prepared to present it.

The Court: No, unless you have something you wish to supplement on that.

Mr. Taylor: No, sir, there is nothing to supplement.

The Court: That motion will be denied. That is, the motion to dismiss.

* * * * * * *

[fol. 68] Thursday, August 29, 1963

Ralph W. Locke, Jr., a witness, called by and in behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Broome:

Q. Will you state your name, please, sir?
A. Ralph W. Locke, Jr.
Q. And where do you live, Mr. Locke?
A. Torrance, California.
Q. And what is your occupation?
A. Tool and die maker and mold maker.
Q. And how long have you been a tool and die maker?

A. Twenty-seven years.

Q. Were you ever in the course of your occupation as a tool and die maker a member of the International Union of Mine, Mill and Smelter Workers?

A. Yes.

Q. Will you tell us, please, sir, when—that is, when you became a member and how long you continued a member?

A. I joined the International Union of Mine, Mill and Smelter Workers in 1940, I believe it was. I continued my membership until 1942 in October when I enlisted in the Navy. I rejoined the Mine-Mill, Smelter Workers in 1945 after my discharge from the Navy.

Q. And how long then did you continue to be a member of the International Union of Mine, Mill and Smelter Workers after that, in 1945?

A. Until 1949.

Q. I believe you mentioned that Military service; what branch of service were you in, sir?

A. United States Navy.

Q. And the tenure of that when you went in the Navy and when you got out?

A. I beg your pardon?

Q. And when was it that you went in the Navy and when did you get out?

A. I went in, in 19—in October of 1942, and I got out after the V-J day in October of 1945.

Q. Did you get an honorable discharge?

A. Yes, sir.

Q. Now, Mr. Locke, were you ever employed by the International Union of Mine, Mill and Smelter Workers?

A. Yes.

[fol. 69] Q. And what was the date of your employment or its title or its name or what would you call it?

A. International representative.

Q. And when were you so employed, first?

A. 1948.

Q. And how long did that employment continue?

A. Until 1949.

Q. And will you tell us, please, sir, in what section of the country you were working as an international representative?

A. In Detroit and Cleveland and Los Angeles.

Q. Now was that position as international representative in connection with any particular division of the International Union of Mine, Mill and Smelter Workers?

A. Originally, it was the Die Casting Division of the International. Later it became District 3 in my particular area?

Q. All right, sir. Now when you were attached to the Die Casting Division, as an international representative, do you recall who the head of the Die Casting Division was?

A. Kenneth Eckert was a board member.

Q. And he was a board member?

A. He was a board member.

Q. Where *was* his headquarters, be, sir?

A. Cleveland.

Q. How long was it that you worked in Detroit?

A. From January until April.

Q. And when you finished work at Detroit, where did you go?

A. To Cleveland.

Q. And still as an international representative of the Die Casting Division.

A. Yes.

Q. How did you happen to make a trip over to Cleveland?

A. I was instructed by Eckert to come to the Die Cast Council Meeting that was going to be held in Cleveland in early April to report on the succession of Detroit.

Q. And pursuant to that request or that instruction, you did go to Cleveland.

A. Yes.

Q. Was there a meeting of Die Casting Council at that time in Cleveland?

A. Yes.

Q. Will you please explain to the jury and the Court, Mr. Locke, just what you mean by Die Casting Council?

A. The Die Casting Council was composed of delegates from the Die Casting Division from all sections of the country.

Q. And can you tell us, sir, as nearly as you can recall, when that meeting of the Die Casting Council took place? [fol. 70] A. In early April. Do you wish me to set the date?

Q. No. As nearly as you can, if you can, fix it exactly?

A. Well, it was the 8th of April.

Q. All right.

Did you attend the meeting?

A. Yes.

Q. Do you recall where in Cleveland it was held?

A. It was in the Holland Hotel.

Q. Do you recall the names of any of the other delegates or officials who were present at the Die Casting Council?

A. I can recall some of them.

Q. All right.

A. Kenneth Eckert, of course, was a board member and was present and shared the meeting.

You see the delegates from Cleveland were Joe Londan, and Ray Dennis. I don't remember who the other one was.

The New York delegation, the only one that I can name, positively, now, is Irving Dichter.

The Chicago delegation was composed of James Pinta, and Bill Jackson, I think. I am not quite sure about that name, but I think it is Bill Jackson.

The Kansas City delegation, I don't remember who they were. The Los Angeles delegation didn't come because of the expense of the trip.

Q. All right. Now you mentioned Mr. Raymond Dennis; do you know Mr. Dennis?

A. Yes.

Q. Do you see him in this Court room?

A. Yes I do.

Q. Would you identify him, please, sir?

A. He is sitting right there behind the counsel with the glasses on. That would be the Negro.

Q. All right, sir. And you mentioned Mr. Irving Dichter. Do you know Mr. Dichter?

A. Yes, I do.

Q. Do you recognize him in the Court room?

A. Yes, I do.

Q. Will you point him, please.

A. He is sitting right next to Ray Dennis, this side.

Q. All right. Now, Mr. Locke, do you recall any event or discussion that took place at the meeting of the Die Casting Council?

A. At the meeting itself?

Q. That's right.

A. The discussion involved—

[fol. 71] Mr. Taylor, may it please the Court, objection. It is hearsay and irrelevant because the defendant was not there.

The Court overruled.

A. A discussion revolved around a resolution that Eckert presented to the Die Cast Council.

By Mr. Broome:

Q. All right, sir. Have you seen that resolution?

A. I saw it approximately 15 minutes before the council meeting started.

Q. And where did you see it?

A. In the office of the Mine-Mill and Smelter Workers in the CIO Building in Cleveland?

Q. Was that in Mr. Eckert's office.

A. Yes.

Q. All right, sir. And who showed it to you, if anybody?

A. Irving Dichter.

Q. Who was present at the time you saw this resolution and it was shown to you?

A. Mostly the same people that I mentioned before as being delegates was Dichter, Pinta, Jackson, I believe it was; Dennis, Joe London, myself, and Eckert, of course. I don't recall the names of the rest. It has been a long time ago.

Mr. Broome, may this document be marked as Government's Exhibit No. 1?

The Court: Yes.

By Mr. Broome:

Q. Mr. Locke, I hand you what has been marked as Government's Exhibit No. 1. I ask you to examine it and see if you can identify it?

A. Yes, sir, that is the resolution.

Q. That is the resolution you spoke of?

A. That is a copy of the resolution I saw in the office in Cleveland.

Q. Yes. And is that the resolution that was presented to the Die Casting Council.

A. Yes.

Mr. Broome: If it please the Court, the Government offers in evidence Exhibit No. 1.

Mr. Taylor: May we see it? Your honor the defense objects to this Exhibit on the same ground that it is not *probitive*, and to conspiracy, it doesn't question the authenticity of the Exhibit.

[fol. 72] The Court: May I see it.

Mr. Taylor: Your Honor, can we have a continuing objection on this evidence prior to the date charged, so we don't have to repeat it each time?

The Court: It will be understood that the defense objects to any testimony going to the time prior to the alleged conspiracy set out in the indictment.

Mr. Broome: May it please the Court, may I have permission to publish this exhibit to the jury at this time? Read it?

The Court: Yes.

(Mr. Broome read Government's Exhibit 1 aloud to the jury.)

By Mr. Broome:

Q. Now, at the time you first saw this resolution, Mr. Locke, in the office as shown to you by Mr. Dichter, do you recall anything that Mr. Dichter said about it?

A. Yes.

Q. All right.

Mr. Taylor: Your Honor, can I renew the objection now on the ground of hearsay?

The Court: Well, the objection is overruled, and at this time, ladies and gentlemen the Court will instruct you that you can only consider any purported statements made by Mr. Dichter in connection with the case against him, and him alone. It cannot be considered by you in any manner or to any degree against any of the other six defendants, unless it is later shown that any of the other defendants were present, of course.

By Mr. Broome:

Q. Who was present at this meeting where you were shown the resolution?

A. Well, Eckert was there. Dichter was there, Pinta, Joe London, myself, Ray Dennis, and others that I can't recall offhand.

Q. Now, reverting to the question I asked you before, will you tell us, please, sir, what it was that Mr. Dichter said, as nearly as you can recall?

A. He stated that this was a dirty, sneaky thing to do, that the resolution should have been shown to the staff prior to the time of the Council meeting, and that there [fol. 73] should have been discussion among the staff before presenting a resolution of this type, and that he was going to call Travis and have him come to Cleveland as soon as he could to see what he could do about it.

Q. All right, now, Mr. Locke, you mentioned Mr. Travis. Do you know Mr. Travis?

A. Yes, I do.

Q. Do you see him in the court room?

A. Yes, sir, I do.

Q. Would you please point him out?

A. He is the one with the patch over his eye, sitting on this side.

Q. All right, now, let's go to the meeting of the Die Casting Council itself. Was there any discussion at the meeting itself on this resolution?

A. Yes, considerable.

Q. Do you recall any of the persons who discussed it?

A. It was Dichter and Pinta and a couple of the other delegates. I don't recall offhand now who it was who spoke in violent opposition to this resolution. The ones who spoke in favor of it were Pete Zvara, some of the other Toledo delegates, and Eckert and, oh, I can't recall. This has been years.

Q. All right.

A. But these were the principal speakers.

Q. Now, was any action taken on the resolution?

A. The resolution was passed by the Die Casting Council. It was adopted.

Q. Now, Mr. Locke, following that meeting of the Die Casting Council—strike that. Let me ask you this question, first. Mr. Locke, were you ever a member of the Communist Party?

A. Yes.

Q. Would you tell us, please, when you first joined the Communist Party?

A. 1941.

Q. And how long did you continue to be a member of the Communist Party?

A. I dropped out in 1942 when I enlisted in the Navy. I rejoined the Party in—I don't know whether it was '46 or thereabouts, right after the Cleveland convention at which time I spoke as a Communist, and it was after I returned home. I rejoined the Party and remained in the Party until 1949.

Q. Do you remember about what time in 1949?

A. It was around June or July.

Q. All right.

A. Probably July.

Q. Now, following this meeting of the Die Casting Council, did you attend any other meeting, either that day or the following day?

A. Yes.

Q. And where was that meeting held?

[fol. 74] A. In a hotel on the east side of Cleveland, in the negro district.

Q. And do you recall whether it was the same day, or was it the following day, as nearly as you can recall?

A. I'm not sure. The meeting had to wait until Travis got into Cleveland. I can't be quite sure whether or not it was that same afternoon or the following morning.

Q. What kind of meeting was it, Mr. Locke?

Mr. Taylor: Objection, Your Honor. That calls for a conclusion of the witness and is purely descriptive.

The Court: Objection overruled.

A. It was a meeting of the Communist Party members on the staff of Mine-Mill who were present in Cleveland at that time, in addition to which there was Joe Brandt, the Communist Party functionary of the—functionary of the Communist Party.

Q. Do you know what his position was in the Party?

A. I don't know the official title. I understand it was the Industrial Secretary or something of that nature. They have so many titles.

Q. Of the Communist Party?

A. Yes.

Q. Now, this man, Joe Brandt, is that who you refer to?

A. Yes, sir.

Q. Was he an officer or employee of the International Union of Mine, Mill and Smelter Workers?

A. No, he wasn't even a member.

Q. Now, will you tell us, please, sir, as nearly as you can recall, who was present at that meeting?

A. Travis,—well, start with Joe Brandt, Travis, Dichter, myself, Ray Dennis, Jimmy Pinta, a couple of other delegates from the New York area. I can't recall their names, and I think it was Bill Jackson from the Chicago area,

and, of course, there wasn't anybody there from Los Angeles except me.

Q. Was there any discussion at this meeting?

A. Yes.

Q. Do you recall the topics discussed?

A. Yes.

Q. What were the topics discussed?

A. The topics were the resolution and the action to be taken against Eckert for imposing them.

Q. Who discussed it?

A. Joe Brandt was chairing the meeting for the most part. He spoke on it. Travis spoke on it. Dichter spoke on it. Pinta spoke on it. I guess almost everybody expressed an opinion.

[fol. 75] Q. All right, sir, now will you tell us as nearly as you can now recall it?

Mr. Taylor: I object to that as hearsay, Your Honor. What Mr. Brandt said is not admissible.

The Court: I am going to sustain the objection at this time.

By Mr. Broome:

Q. Well, now, can you tell us what Mr. Travis said?

A. He was in agreement with Mr. Brandt.

Mr. Francis: Objection, Your Honor.

The Court: The objection is sustained. That isn't a responsive answer, Mr. Locke. Can you state in substance what Mr. Travis said?

A. (Continued) Mr. Travis said that he was going to cut off Eckert's expense account, his salary, his phone bills and do everything possible to keep him from traveling around through the locals and creating a recession movement. The question also of the signing of the affidavits was discussed. He said that this was an impossibility because it would behead the union, to sign the non-Communist affidavits under the Taft-Hartley Act.

Q. Now, Mr. Locke, had there been any discussion along the same line as you outlined Mr. Travis talking by Joe Brandt?

A. Yes.

Mr. Taylor: Objection, Your Honor, and ask that it be stricken.

Mr. Broome: Your Honor, I think this is admissible, any discussion by Joe Brandt.

The Court: How would it be on exception to the hearsay rule?

Mr. Broome: It might appear that he is doing what Joe Brandt told him to do.

The Court: The objection will now be overruled, and you may continue then.

Mr. Taylor: Was it overruled, Your Honor?

The Court: Yes.

[fol. 76] By Mr. Broome:

Q. All right, now, Mr. Locke, will you please tell us as nearly as you can recall what it was that Joe Brandt said?

Mr. Taylor: Objection, Your Honor. I thought the objection was sustained to that before.

The Court: It was, and I am permitting it to be answered now. The objection is overruled.

A. Joe Brandt led off the discussion in outlining to the Party members what we should do in Mine-Mill. He stated that Eckert should be cut from the staff, that his expense account should be cut off, his phone bills, everything, mileage, that he was to try to keep him as close to home as possible so that he couldn't visit the other locals and create a secession there. He stated that the Party was going to publicly expel Eckert and publish it in "The Daily Worker", and send it out to the plant leads of all the shops we had in the Cleveland area and elsewhere, and I guess that was about all.

Q. That's about what you can recall, Mr. Locke?

Mr. Taylor: Excuse me, Mr. Broome. Your Honor, could I now ask that Your Honor give the limiting instruction with respect to that answer. I guess I must ask that the jury be instructed as it not be binding on any defendant, is not a declaration by any defendant.

The Court: Well, the request would be denied, but I will instruct the jury that on any of the statements that are attributed to a party that's not a defendant, you should only consider that against a defendant as you may find from the evidence that the defendant adopted the statement. All right, you may proceed.

Mr. Taylor: Excuse me, Your Honor, that would be limited to the defendants that were present, I presume, and who could be found to adopt the statement?

The Court: That's right, and it was Mr. Dichter and Mr. Travis who were present. I don't know if Dennis was present or not. You will have to rely on your own memory for that.

By Mr. Broome:

Q. Do you recall anything Mr. Dichter said?

A. He was in agreement with Joe Brandt. I don't recall—

Mr. Francis: Objection, Your Honor. It is not responsive.

The Court: The objection is sustained. Now, the answer [fol. 77] will be stricken. Can you give us the substance of anything he said?

A. (Continued) Dichter was appointed—

Q. No, that's not responsive. We will get to that. I believe you said you did remember specifically what he said?

A. I don't recall specifically.

Q. All right, sir, now following that meeting, this meeting that you had described as a Party meeting, did you attend any other type of meeting that day?

A. Yes.

Q. And where was that meeting held?

A. In Eckert's office in Cleveland, in the CIO Building.

Q. Who was present at that meeting?

A. The staff from—well, there was, of course, Eckert, Travis, Dichter, Dennis, London, myself, Pinta and Bill Jackson, I believe. I think that's his name, and a couple of others from New York and Chicago. I can't recall who. and then Toledo. There was Pete Zvara from Toledo and it was all staff members of Mine-Mill.

Q. Yes, all right. Was there any discussion at that meeting?

A. Yes.

Q. And who participated in that discussion?

A. It was Eckert and Travis and I don't recall who some of the others were that spoke.

Q. Well, now, will you tell us as nearly as you can recall what Mr. Travis said?

A. He told Eckert that he was fired, that his expense account was no longer. That included his mileage and all other expenses, including the telephone and so forth, that he was placing Irving Dichter in charge of the Cleveland office, and that all of the staff members were to make their reports from the Cleveland area east to Irving Dichter and all the locals or staff members from Cleveland west were to make them to Travis directly, and under no circumstances were we to—the staff members—to have any contacts with Eckert in any way.

Q. And what, if anything, do you recall that Eckert said?

A. He told Travis, he says, "This is unconstitutional," according to the Constitution of the Mine-Mill Smelter Workers, that is, that Travis did not have the authority to fire him or cut off his expense account or do any of the things that he was going to do, that he intended to take it up with the Executive Board of the International and that they were the only ones empowered to do the things that Travis dictatorially did at that meeting.

Q. Did anyone else there that you recall participate in that discussion?

A. Yes.

Q. Who was that?

[fol. 78] A. Pete Zvara discussed it. He also was in agreement with Eckert, this was against the Constitution of the Mine-Mill Smelter Workers. Dichter spoke briefly. I don't recall exactly what he said, but he was in agreement—

Mr. Taylor: Move to strike that, Your Honor. If he doesn't know, he doesn't know.

A. (Continued) He did discuss the organization—

Mr. Francis: Just a minute.

By Mr. Broome:

Q. Do you remember now what Mr. Dichter said?

A. I can't give you the exact words.

The Court: Now, just a moment, let me instruct you, Mr. Locke, that when one of the counsel rises to address the Court, if you will not continue with your answer until the Court rules, please.

The Witness: Yes.

The Court: As I recall the request of counsel, Mr. Taylor was that something be stricken. Well, I don't know what there is to strike. He didn't relate the conversation.

Mr. Taylor: I understood the witness to say he couldn't remember what Dichter said, but he was sure it was in agreement with somebody else. If he doesn't remember what it was, I am sure he can't testify, but he was sure it was in agreement with somebody else. If he doesn't remember what it was, I am sure he can't testify.

Mr. Broome: Then, he started to tell what he said.

The Court: Well, the answer will be stricken and the jury instructed to disregard it. You may inquire if he now remembers what he said.

By Mr. Broome:

Q. Mr. Locke, do you now remember anything that Mr. Dichter said?

A. Not the direct conversation. I could give you the gist of it.

Q. The substance?

A. Substance.

Q. Can you remember the substance of it?

[fol. 79] A. The substance of it was that Dichter was then going to move into Cleveland, going home only occasionally. He would set up organizational plans for staff meetings in the Cleveland group and the outline of generally how we were going to proceed in this secession movement that we were sure was coming about.

Q. All right. Following that meeting—

Mr. Taylor: Your Honor, if they have left the meeting, could we have the one with the instruction.

The Court: All right. Ladies and gentlemen of the jury, as to the alleged conversations which the witness has testified to or the statements made by some of the defendants, now as to the alleged statements made by Mr. Travis, you can only consider those statements against the defendant Travis only and cannot be considered by you in any manner against the other defendants, except, insofar as you may determine from the evidence in the case that any of the other defendants present at this meeting may have consented to or adopted these statements made by Mr. Travis.

The same instruction is made with reference to alleged statements made by Mr. Dichter. These can be considered against the defendant Dichter not be considered by you against any of the other defendants except only insofar as you may find from the evidence, if you do so find, that the statements so by Mr. Dichter were consented to by any of the other defendants present at this meeting. All right.

By Mr. Broome:

Q. Now, Mr. Locke, following that meeting that you have described, was there any change in the management of the Cleveland office.

A. Yes.

Q. And what was the change?

A. Dichter replaced Eckert in the office.

Q. And do you know what became of Eckert?

A. He moved to another building.

Q. All right. Now, did some part of the staff remain with Dichter.

A. The whole staff remained with Dichter.

Q. Was any part of the staff gone with Eckert?

A. No.

Q. Are you talking of the Cleveland staff?

A. Yes.

Q. All right. And who was the staff at that time attached to the Cleveland office.

A. It was Dichter; Ray Dennis, myself and Joe London.

Q. All right. And now who did you make your reports to after this change in management.

A. To Dichter.

[fol. 80] Q. All right, sir. Now do you remember how—did Mr. Dichter stay in the area all the time?

A. For the most part he was in Cleveland. He visited his home occasionally in New York.

Q. Yes. And how long did that arrangement last, that he stayed in Cleveland?

Mr. Francis: If it please the Court, I think we should have this tied down as to time. The statement has been made by the witness that following that meeting, namely, this meeting of the staff office in Cleveland, Dichter replaced Eckert; Eckert moved to the other place, and then the staff reported to Eckert. The witness does not tie down when this matter occurred.

The Court: Continuing objection is well taken. I think you should tie it down as well as you can as to time.

By Mr. Broome:

Q. When did this change take place?

A. Right after the meeting in Eckert's office. Eckert moved out. Dichter moved in.

Q. Do you remember what month?

A. Dichter moved in and Eckert moved out; that's the way it was.

Q. Do you remember what month that was.

A. That was in April.

Q. All right. In what year?

A. 1948.

Q. All right, sir. And how long did Dichter remain in the Cleveland office in charge of it, to the best of your recollection.

A. It was about two or three months or maybe a little longer.

Herman Clott came in shortly after Dichter left.

Q. All right. Now, did Mr. Dichter set up any change in procedures as far as staff meetings were concerned?

A. We had meetings nearly every morning for awhile.

Q. And that was immediately after he took over the Cleveland office?

A. Yes.

Q. And how long would you say?

A. For awhile.

Q. How long would you say it continued?

A. Oh, maybe a month or two.

Q. Yes. And then following that, did you have staff meetings?

A. Yes.

Q. And how frequently did you have staff meetings?

A. Oh, once a week or twice a week, sometimes.

Q. Now, who, generally, would be in attendance or was in attendance at these staff meetings?

[fol. 81] A. It was Dichter, Joe London, Ray Dennis, myself and Joe Brandt.

Q. Is that the same Joe Brandt you mentioned before.

A. Yes.

Q. That was present at the meeting?

A. He was present at a number of the meetings.

Q. Well, I mean, is he the same Joe Brandt you named as being present at this hotel at this meeting in Cleveland?

A. Yes, sir.

Q. Was he at that time a functionary of the Communist Party?

A. Yes.

Q. Do you know how it come about how Joe Brandt came to the staff meetings?

A. Joe London went to his office and fetched him; brought him to the meeting.

Q. Well—

Mr. Francis: Objection here, your honor. The action of Joe London would be hearsay, under the hearsay rule.

The Court: Objection is overruled.

By Mr. Broome:

Q. All right. Do you know how Joe London came to go get him?

A. On Dichter's order.

Q. You heard Dichter give such orders?

A. Yes.

Q. And how long did these meetings go on; over what period of time, would you say, that Joe Brandt would attend the meetings of the staff.

A. Do you mean in the International office or just the meetings of the staff, per se?

Q. Well, in the international office?

Mr. Francis: We would have the same objection; hearsay, your honor. The time element should be tied down. The question is how long, but he doesn't state from when to when.

The Court: I think the objection is well taken. You should try to establish a starting time period.

By Mr. Broome:

Q. About when did this practice start of calling Joe Brandt into the staff meetings.

A. In April.

[fol. 82] Q. That's when Dichter took over?

A. Yes.

Q. These meetings would take place in the office of the Union.

A. Yes.

Q. Did they continue to take place in the office of the union during all of the time that Brandt—or did it continue?

A. No.

Q. Now, you say it started in April. How long did these meetings with Joe Brandt in attendance go on that were held in the office of the union.

A. I would say approximately a month and a half or close to two months, maybe.

Q. And then were there some changes made?

A. Yes.

Q. And after that where were the meetings, where would they take place?

A. In other rooms; hotel rooms, sometimes, or down at the other Hungarian Workers Hall or places like that.

Q. Mr. Locke, do you know what the reason was for making this change.

A. The staff—

Q. No, just answer my question. Do you know what the reason was?

A. Yes.

Q. Did you hear it discussed?

A. Yes.

Q. And where was the discussion; where did it take place?

A. In the office of the CIO, the Mine-Mill office.

Q. About when was this discussion?

A. I think it was around June, sometime. I can't recall exactly. This has been so many years ago.

Q. And who was present at this discussion?

A. Well, do you mean at the time that we made the decision?

Q. Wherein it was discussed?

A. Yes. It was Joe Brandt, Dichter, Ray Dennis, Joe London and myself.

Q. All right. And do you remember who entered into the discussion?

A. I think we all did. Joe Brandt and all of us entered into it.

Q. Let's start with Joe Brandt. Did Joe Brandt say—

A. Well, the discussion was over the meeting place of the staff with Joe Brandt.

The discussion centered around the bad publicity especially so to the Alcoa situation which would arise of Joe Brandt going in and out of the Union office in the CIO office.

Mr. Francis: Objection, your Honor. The answer is not responsive to the original question.

[fol. 83] The Court: The objection is overruled.

By Mr. Broome:

Q. What was it that Brandt said, if you can recall it in substance?

A. That we would hold a meeting some place else.

Q. Do you remember anything that Mr. Dichter said?

A. We were all in agreement.

Mr. Taylor: Move to strike.

The Court: That answer will be stricken as not responsive.

By Mr. Broome:

Q. Could you remember in substance what Mr. Dichter said about him?

A. Well, he said that this could lead to bad publicity, that the Alcoa situation was very touchy. We were under attack from the secessioners therein Alcoa and anything we did, that could cause bad publicity, should be avoided.

Q. All right. Do you remember anything Mr. Dennis said.

A. No, I don't recall.

Q. All right. Now you referred to an ALCOA situation?

Mr. Taylor: Please the Court. May we have the cautionary instruction, please. You are leading out.

The Court: Again, ladies and gentlemen, you are instructed in connection with this purported meeting that any

statements made by Mr. Dichter can be considered by you as in the case against him only and not against any of the other defendants unless you find from the evidence that any of the other defendants assented to or consented to what he said at that meeting:

Mr. Taylor: Does that apply to the statements made by Brandt, too, your Honor?

The Court: Yes. Those statements would always apply to the alleged statements made by Mr. Brandt. You should not consider any of them against any of the defendants unless you find that they assent to them or consent or adopted them.

By Mr. Broome:

Q. Now you referred to the ALCOA situation, just what did you mean by that, Mr. Locke?

A. The ALCOA Local in Cleveland had voted to succeed from the Mine-Mill and Smelter Workers.

[fol. 84] Q. Yes?

A. And there was a struggle on the part of Mine-Mill to hold a local one, the Mine-Mill and Smelter Workers.

Q. Was there an election then pending before the NLRB?

A. At the conclusion of the contract there was an election.

Q. Yes. All right. Now, what size local was the ALCOA Local in comparison with other die-casting locals in the area?

A. It comprised the overwhelming majority of the Mine-Mill membership in Cleveland.

Q. About how large was it, if you can recall?

A. Five thousand, approximately.

Q. All right, sir. Now, you say it was in a state of trying to secede—

A. Yes.

Q. —from the Mine-Mill?

A. Yes.

Q. Do you know who was leading that secession movement?

A. Kenneth Eckert.

Mr. Francis: Objection. We feel there are too many questions, including this one, that are not tied down as to point of time and this question is subject to the same effect, your Honor. We are not sure when this matter is now under consideration.

The Court: I don't think it is necessary to pinpoint every statement as to time. He is relating the matter in narrative form that which took place in a few short weeks. The objection is overruled.

Mr. Broome: Mr. Reporter, would you read the question. The question has slipped my mind.

The Reporter: Do you know who was leading that secession movement?

By Mr. Broome:

Q. What was your answer on that?

A. Kenneth Eckert.

Q. Kenneth Eckert. All right. Now, following this change of meeting places, did the staff continue to have meetings with Joe Brandt?

A. Yes.

Q. And about when did this arrangement start where you were meeting with him but not in the office?

A. It was during the ALCOA secession.

Q. Is that the best you can do?

A. Well, I could say it was in the summertime when I started—

Q. All right. And how long did those meetings go on where you were not meeting at the Union Hall or offices of the Union, but the staff was still meeting with Brandt at other places? How long did that arrangement continue? [fol. 85] A. That lasted until the ALCOA NLRB election was over.

Q. Were those meetings attended by the staff members?

A. Yes.

Q. And who were the staff members during this period?

A. Well, it was, I think by then, Clott had come into the office there. There was Ray Dennis, Joe London and I.

Q. All right?

A. And me and others.

Mr. Francis: Just a second, your Honor. I don't believe the witness had finished answering the question.

Mr. Broome: I thought he had.

The Court: Are you finished answering the question?

The Witness: I don't know whether it was required.

The Court: You were just asked who was present, that time.

A. (Continuing) The international representatives from the United Electrical Workers and some from the Chemical Workers in Cleveland. Staff's joint leaders in this ALCOA Company.

Q. I see. All right. Mr. Locke, during the summer of 1948, did you belong to any Communist Party Club?

A. Yes.

Q. And what was the name of the club?

A. The ALCOA Club.

Q. Do you know about what time you became a member of this club?

A. I was assigned there—I imagine it was around May or June. Just shortly after I had come in to Cleveland.

Q. And who assigned you there?

A. Joe Brandt.

Q. Do you know the names of any of the other members of that club?

A. I know some of them, yes.

Q. All right. Will you tell us who they were?

A. Well, there was Joe London. Herman Clott was meeting with us. I don't know whether he was actually a member of the club, but he was assigned to that club. Dichter attended some of the meetings.

Ray Dennis was there, attended the meetings, and Joe London and myself.

Q. Now over what period of time did you belong to this club and did you attend the meetings?

A. Until after the election meeting. Until after the ALCOA election.

[fol. 86] Q. Did the club have any purpose in existing?

A. It was a Communist Party Club; ALCOA Workers, primarily.

Q. All right, sir. Now during the summer of 1948, Mr. Locke, did you have occasion to make a trip to Chicago?

A. Yes.

Q. Do you remember when it was?

A. I can't place the exact date. It was in the summer time.

Q. Well, to the best of your knowledge?

A. June or July, I guess.

Q. All right. In 1948?

A. I think it was around June. I am not sure of it.

Q. How did you happen to make this trip to Chicago?

A. I received a phone call from Maury Travis instructing me to come to Chicago to make a report on Eckert's activities of the secession movement in the Cleveland area. The purpose of the trip was to look over the ALCOA Plant being built in Chicago.

By Mr. Broome:

Q. Are you saying what Mr. Travis told you?

A. Yes.

Q. All right, sir, and you did make the trip?

A. Yes.

Q. And did you—where did you go first in Chicago?

A. To the International offices.

Q. And who did you meet there?

A. I met Travis and some of the other fellows.

Q. Did you have a conversation with Travis?

A. Yes.

Q. And was anyone else present at the conversation?

A. I can't recall specifically, but it might have been Stern or Sanderson there.

Q. All right, now, will you tell us, please, sir, what Mr. Eckert said on that occasion, if you can recall it?

A. Mr.—

Q. I don't mean Eckert, I mean Travis.

A. He told me—I had reported briefly on Eckert's activities in the secession in the office and he told me that evening they were having a meeting at his home of the Communist Party people in Chicago and that I should come to it.

Q. Did you attend that meeting?

A. Yes.

Q. And where was it held?

A. In Travis' home.

Mr. Taylor: Excuse me, Mr. Broome, are you leading to a conversation?

Mr. Broome: Yes.

[fol. 87] Mr. Taylor: Could we have a cautionary about the conversations with Travis, and might we have—I suggest the testimony of the witness about the presence of anyone else is so uncertain this should be considered only with respect to Mr. Travis.

The Court: You are instructed, ladies and gentlemen, concerning this last conversation that the witness has related with Mr. Travis that you should consider anything purportedly to have been said by Mr. Travis only against Mr. Travis in the case against him and not against any of the other defendants. All right.

By Mr. Broome:

Q. Did you attend the meeting at Mr. Travis' home?

A. Yes.

Q. Will you tell us as nearly as you can recall now who was present at the meeting?

A. It was Travis and his wife. It was Harold Sanderson, Bernie Stern, and I think Henry Horowitz was there and his wife, Morrie Wright, and myself. Otherwise, there was Pinta, and a couple of other people from the Chicago area.

Q. All right, sir. Now, you mentioned the name, Mr. Sanderson.

Do you know Mr. Sanderson?

A. Yes.

Q. Is that Mr. Harold Sanderson?

A. Yes.

Q. Do you see him in the court room?

A. Yes, sir.

Q. Will you please point him out?

A. He is the man sitting at the end with the glasses on.

Q. All right, sir, now was there any discussion that went on there that night?

A. Yes.

Q. Did you remember any of the topics that were discussed?

A. Taft-Hartley affidavits were discussed again.

Q. All right, who discussed it?

A. Travis and Bernie Stern and others. I don't recall.

Q. All right, tell us as nearly as you can recall what it was Mr. Travis said?

A. Well, he stated again that we, the Mine-Mill Smelter workers could not sign the affidavits. It would be impossible. It would behead the union, and that we would have to fight it out even if we had to take the union back to the hills. There was other discussion, but I can't recall offhand.

Q. Was there other things to the conversation?

A. Well, the activities of Eckert was discussed. Another subject was discussed in quite detail and that was the assistance that we were getting from the Communist Party in Cleveland and the various other organizations like the staff of the U.E., and so forth and so on, but mainly it was the question of what the Communist Party was doing to assist in leaflets and newspaper distribution at the plant gates and so forth.

[fol. 88] Q. Did you make a report on that?

A. Yes.

Q. Now, was there anything else that you recall that Mr. Travis said that night at this meeting?

A. I can't remember.

Q. Was there other discussion? Well, just was there?

A. Yes, I guess there was.

Q. Could your memory be refreshed?

A. It might.

Q. Do you recall whether anything was said about Phil Murray at that meeting?

A. Yes.

Mr. Taylor: A general question, Your Honor, by whom?

The Court: Objection overruled.

Mr. Francis: The further objection that the question is seriously leading.

The Court: Yes, and so that we will understand the ground rules gentlemen, just have one counsel for a side make an objection. It is confusing to the Court. The objection is overruled. You may proceed.

By Mr. Broome:

Q. Now, who was it that discussed Phil Murray?

A. Travis.

Q. All right, can you tell us, please, sir, what it was Mr. Travis said about Phil Murray?

A. That we should use Phil Murray's position in boycotting the affidavits to bolster our own position in refusing to sign the affidavits.

Q. Yes, all right. Mr. Locke—

Mr. Taylor: Your Honor, if Mr. Broome is leading up, can we have the cautionary instruction, please?

The Court: You have completed your interrogation?

Mr. Broome: On this point, yes.

The Court: This meeting?

Mr. Broome: Yes.

The Court: Again, I instruct the testimony given by this witness on statements purportedly made by Mr. Travis

can be considered by you only in the case against Mr. [fol. 89] Travis, except as you may find, if you do find by the evidence, that such statements were assented to or consented to or adopted by the defendant Sanderson.

Mr. Witt: May we have a moment at counsel table, if the Court please?

The Court: Yes.

(Counsel conferred)

Mr. Witt: Thank you, Your Honor.

By Mr. Broome:

Q. Did there come a time when the—when the Die Casting Division was dissolved, to your knowledge?

A. Yes.

Q. Do you recall about when that was?

A. It was right after the convention. I think it was in late summer, September or October, around September, I think.

Q. All right, and now following the dissolution of the Die Casting Division, what became of the staff that had formerly been attached to the Die Casting Division?

A. The Die Casting Division was then placed into the geographic districts in which the locals were located.

Q. And what happened? Did you have any locals left that had been in the Die Casting Division in the Cleveland area?

A. Yes.

Q. What disposition was made of them?

A. They were sent or put into District 3.

Q. And you and other members of the staff, what arrangements were made with respect to your services?

A. We were to work under the Board member of District 3.

Q. Who was the Board member of District 3?

A. Jesse Van Camp.

Q. Do you know Mr. Van Camp?

A. Yes, sir.

Q. Could you point him out, please? Do you see him in the court room?

A. He is sitting next to Harold Sanderson, second from the left.

Q. Do you remember when you first met Mr. Van Camp?

A. In East St. Louis.

Q. When was it?

A. It was in December when we went to this educational meeting, the first time.

Q. What was the occasion of the meeting?

[fol. 90] A. It was an education meeting called by the International for the International representatives.

Mr. Taylor: Is this December 1948?

By Mr. Broome:

Q. You said December 1938?

Mr. Taylor: '48.

A. Yes.

The Court: The witness hasn't given the year, I don't think.

The Witness: All right, I will. It is December 1948.

* * * * * * *

Q. All right, sir, now, Mr. Locke, did there come a time when you were transferred out of the Cleveland area?

A. Yes.

Q. And do you recall about when that was?

A. It was in the early spring. Let's see—

* * * * * * *

Mr. Broome: I believe there is a pending question.

The Court: What was the last question, Mrs. Spencer, please?

(The reporter read the last question and answer.)

By Mr. Broome:

Q. In the early spring of what year?

A. 1949.

Q. Can you do any better about it than just the early spring, could you, for instance, tell us what month it was?

A. It was, I would say, February or March or thereabouts.

I mean, I can't recall the exact date.

Q. Yes, sir.

A. My expense voucher will show that. No doubt, they will bring that up.

Q. Now, was there any discussion in the office or among the staff about the business of reducing the staff?

A. Yes.

Q. And was a reduction in fact made in the staff?

A. Yes.

Q. And were you the man who was sent away?

[fol. 91] A. Yes, I was transferred to Los Angeles.

Q. Do you recall how you first learned there was to be a reduction in the staff?

A. Herman Clott told me that he had received a letter.

Q. Just a minute. Was anybody else present at this conversation?

A. The first one between Clott and myself, no.

Mr. Taylor: Then, I object, Your Honor, hearsay.

The Court: The objection is sustained.

By Mr. Broome:

Q. Was it subsequently discussed between you with anyone else present, between you and Clott and anyone else?

A. Yes.

Q. Who was this other person present?

A. There was Herman Clott, Joe London, Ray Dennis—wait a minute, I am not sure Joe London was there, but anyhow, Ray Dennis and Joe Brandt and myself.

Q. Is that the same Joe Brandt now that attended this party meeting at the hotel on the east side of Cleveland?

A. It is.

Q. And the same Joe Brandt that attended your staff meetings that you testified about?

A. Yes, sir.

Q. All right, what was discussed? Where did the meeting take place?

A. This meeting took place in the Mine-Mill Office in the C.I.O. Building in Cleveland.

Q. And with respect to the time that you were removed from the staff or transferred from the staff, when was it?

A. I don't understand your question.

Q. I am trying to fix the time of this question when Joe Brandt was present. Now, with relation to the time that you actually were transferred out of the area, how long before that was it?

A. A week or two weeks probably.

Q. Now, was there any discussion at the meeting?

A. Yes.

Q. And do you remember who entered into the discussion?

A. Joe Brandt.

Q. All right, anyone else?

A. He did most of the speaking.

Q. Anyone else?

A. Herman Clott.

Q. All right, now, you tell us as nearly as you can recall what it was that Joe Brandt had to say there?

[fol. 92] A. He had been told that the staff was being cut by one. He came to the meeting and stated that under no circumstances was Ray Dennies to be dropped from the Cleveland staff, that they had no negroes on the executive board of the International union and Ray Dennis was being groomed for the board membership of the Third District.

Q. And how soon after that was it you were transferred out?

A. It couldn't have been over a week or two.

Q. How long was it after that—let's see, where did you go then?

A. I went to Los Angeles.

Mr. Taylor: Mr. Broome, if you have left that conversation—may we have the limiting instruction, Your Honor?

The Court: After this conversation, ladies and gentlemen, the Court instructs you the alleged statements made at this meeting by a person identified as Herman Clott are not binding on the defendants in this case. It shall not be considered by you as against any of the defendants in the case except as you may find from the evidence that the defendant Dennis adopted or consented to these statements.

Mr. Taylor: I believe the same as to Brandt, Your Honor. I thought there was some statements by Brandt.

The Court: I don't recall any statements testified to by Brandt, but if there were any by Mr. Brandt at this meeting, the same instruction would apply. That is, you cannot consider those against any of the defendants except as you may find from the evidence that the defendant Dennis may have adopted or consented to or assented to any statements.

I wonder if this might be a good point to break?

Mr. Broome: I have just one or two other questions to finish the direct.

The Court: All right.

By Mr. Broome:

Q. Where did you go when you left the Cleveland area?

A. I went to Los Angeles.

Q. Did you continue on the staff for a while out there?

A. Yes.

[fol. 93] Q. What district was that?

A. District 7.

Q. How long after you got back to California was it that your employment continued with the International?

A. Until July of 1949.

Q. And you were severed at that time?

A. Yes.

Mr. Broome: May it please the Court, that concludes the direct.

* * * * * * *

[fol. 106]

MOTION TO PRODUCE GRAND JURY TESTIMONY OF LOCKE, COLLOQUY BETWEEN COURT AND COUNSEL AND DENIAL OF MOTION

Mr. Taylor: The defense now moves for the production of the minutes of the Grand Jury testimony given by the witness Locke. Our motion is made in the alternative, production to the defense, or if that be denied for production to the Court for examination in camera.

We represent to the Court and suggest that there is a sufficient and particularized need for scrutiny of the Grand Jury minutes; that there is more than a possibility, there is a probability, of inconsistencies between the testimony that Locke has given here and what he has told the Grand Jury; the particularized need being supported, we suggest, by the fact that the testimony deals almost entirely with alleged declarations by one or more of the defendants; that the contents of these declarations are uncorroborated by other witnesses so far as we know and judging from the prior trial there is very little chance they will be corroborated; that the specific wording of these declarations may be of considerable importance in determining their weight, and, furthermore, that there is inconsistency between the testimony given on this occasion and the testimony given at the prior trial.

For all these reasons, there is a sufficient likelihood of inconsistency so that the minutes should be produced to the defense.

Mr. Broome: If the Court please, our position is just the same as it was on the occasion when this motion was made at the prior trial four years ago. I don't believe counsel has shown any particularized need, but it is a

matter that is so much within the discretion of the Court that I don't think we ought to take a position on it one way or the other.

[fol. 107] The Court: It is my recollection that this particular problem was before the Court of Appeals and it was discussed by Judge Murrah in his opinion and he stated in substance that the Court was correct in the manner in which it was handled at the last trial, that a particularized need had not been shown, and to this point I do not find any additional showing having been made for the necessity of those minutes being produced, so the Court will deny the request, both for the production of the minutes and for the Court's in camera inspection of them at this time.

Mr. Taylor: Your Honor, I don't want to argue that further, but the same question is likely to arise again. Might I suggest, Your Honor is of course quite right this was dealt with in the Court of Appeals opinion. My belief is what the Court of Appeals technically ruled is that Your Honor did not abuse discretion in declining. That does not mean your discretion is foreclosed. I mean, opportunity for fresh exercise is here.

The Court: Well, the matter may come up from time to time, so I suggest you may make the minutes available to the Court. I am not deciding whether I am going to examine them in camera or not. I would like to see the bulk of them and so forth, because, gentlemen, we can either stretch this trial out for three or four months, or we can handle it within a few weeks.

I have nothing scheduled that will preclude me from going on to Christmas, if necessary here, and if that's what it takes, that's what we will do, but I am not going to spend my nights reading FBI statements or Grand Jury minutes. I am going to rest, because I am tired after one of these days, and I am sure counsel are also, so this is the point, so you can present them to me, Mr. Broome, if you will?

Mr. Broome: Yes, I will be glad to do that, Your Honor.

The Court: But I think—I don't think there has been a need shown and if the task doesn't appear to be too burdensome or too onerous, I would be willing to read them, but if I find I have got to read volumes and volumes, I am not going to do it until a higher Court tells me I have to.

* * * * * * *

[fol. 109] Friday, August 30, 1963

Proceedings

* * * * * * *

COURT'S RULINGS ON MOTIONS TO PRODUCE—
August 30, 1963

The Court: Before we proceed any further, gentlemen, the Court should like to state for the record so that it will be perfectly clear as to what the Court's ruling was with reference to the motion of the defendants for the production of the Grand Jury minutes concerning the testimony of the defendant or the witness Locke.

The Court feels that up to this point there has not been any showing on the part of the defendants for any need, and particularly for a particularized need for the production of such minutes.

This would apply both to the suggested in camera inspection in the court of the minutes and of the production to the witness or to such motion of it that may be appropriate. Should it develop that such a need is shown to the Court, the Court will examine the minutes in camera and will deliver to the defendants any portions of such minutes as the Court feels they are entitled to under the applicable law. All right, gentlemen.

* * * * * * *

[fol. 112] RALPH W. LOCKE,

Cross examination.

By Mr. Francis:

Q. Mr. Locke, you are still under oath and you are the same Mr. Locke that testified yesterday afternoon, are you not?

A. Yes.

Q. Yesterday, I believe, Mr. Locke, you testified that you became a member of the International Union of Mine, Mill and Smelter Workers in 1940. Do you recollect that testimony of yours?

A. Yes.

Q. Is it not a fact, Mr. Locke, that actually you became a member of the International Union of Mine, Mill and Smelter Workers sometime in 1942?

A. That is correct. This was after the Die Cast Division had voted to go into Mine, Mill and Smelter Workers.

Q. Previous to being a member of the International Union of Mine, Mill and Smelter Workers, you had been a member of the National Association of Die Casters, isn't that correct?

A. That's correct.

Q. And then the National Association of Die Casters merged with the International Union of Mine, Mill and Smelter Workers sometime in 1942.

A. It was in the early part of '42.

Q. And I believe you testified, did you not, that you had joined the Communist Party sometime in 1941.

A. Right.

Q. So that you joined the Communist Party previous to the time that you became a member of the International Union of Mine, Mill and Smelter Workers, is that not correct?

[fol. 113] A. Technically correct.

Q. Your first employment was in Los Angeles by the International Union of Mine, Mill and Smelter Workers, would that be correct?

A. I was employed by Kenneth Eckert and was to report for work in Chicago.

Q. You were, at the time of employment, in Los Angeles?

A. That is right.

Q. And then is it correct that you then went to Chicago?

A. That's correct.

Q. And from Chicago, I believe you testified, did you not, that you were transferred to Detroit?

A. Right.

Q. And at that time you were under Mr. Eckert?

A. Right.

Q. In other words, he was your superior?

A. That's correct.

Q. And I believe you testified, did you not, that you moved from Detroit to Cleveland in April of 1948?

A. That is right.

Q. Was that still under Mr. Eckert?

A. At that particular time, yes.

Q. Now, Mr. Eckert's first name would be Kenneth?

A. Kenneth.

Q. Ken or Kenneth?

A. Kenneth.

(Defendant's Exhibit A was marked for identification.)

Q. Mr. Locke, I hand you for purposes of identification what has been marked as Defendant's Exhibit A. Will you look at that and tell us if you can identify it?

A. I have never seen this document before. That is not my signature.

Q. I ask you to examine more particularly what is marked as "expense account." Is that your signature at the bottom?

A. No, sir.

Q. Have you ever seen that document before?

A. No, sir.

Q. Would you re-examine that to make sure?

A. I examined it. I have never seen it before and that is not my signature, "R. Locke." That is not my signature.

Q. As an International representative you would have occasion, would you not, to submit expense account vouchers?

A. Yes.

Q. And those expense account vouchers were made for the purpose of reimbursing you for expenses paid out of pocket by yourself?

A. That's correct.

[fol. 114] Q. Also to reimburse you for per diem expenses?

A. Correct.

Q. Those expense vouchers would be submitted by you, would they not, to your immediate superior?

A. That is correct, to the Board member particularly.

Q. And while you were under Mr. Eckert, you would be submitting those to Mr. Kenneth Eckert, is that correct?

A. While I was under him, that was true.

Q. Then Mr. Eckert would either approve or disapprove or make whatever notations he thought appropriate on your expense account and you would be reimbursed by the International Union, is that correct?

A. I have no knowledge of that. I was not a board member.

Q. Directing your attention to the pink portion of Exhibit A, I ask you to examine that for a moment. Have you examined the pink portion of Exhibit A?

A. Yes, I have.

Q. Do you recollect ever being reimbursed the amount set forth on that pink slip?

A. I do not recognize that.

Q. After you would make out an expense voucher, Mr. Locke, to whom would you submit it?

A. To the board member in charge.

Q. And that expense voucher would set forth your expenses and movements about the country for which you were being reimbursed, is that correct?

A. Yes.

Q. You testified, do you remember, about an alleged Communist Party meeting in the hotel in the east side of Cleveland in April of 1948. Do you recollect that testimony yesterday?

A. Yes, I do.

Q. Will you tell us again what day of the month that was?

A. Counsel, this is 15 years ago. I am doing the best I can to answer your questions honestly. It was either the day of the Die Cast Council Meeting or the immediate day following. I recall this very clearly because Travis drove into Cleveland in his own car. It was a Studebaker. We drove up Euclid Avenue to approximately 55th Avenue, turned right, went about four blocks, and entered the hotel. Now, what else do you want to know?

Q. So, despite the passage of this many years, you still remember the route?

A. Yes, I traveled around that area quite a bit in Cleveland. I was a pretty busy International representative, one of the few that was.

Q. April 8 was the first day you had ever been in Cleveland, isn't that correct?

A. No, it is not.

[fol. 115] Q. April 8th was the first day you arrived in Cleveland as a International representative for this union?

A. That is correct.

Q. Previous to that you had been in Detroit, isn't that so?

A. Yes.

Q. And on your arrival you immediately, as I understand, or the next day, proceeded to join a Communist Party meeting.

A. No, sir, you have it wrong. My testimony did not state that.

Q. Well, didn't you testify yesterday that you attended a Communist Party meeting the second day after your arrival in Cleveland of April of 1948?

A. That is—

Mr. Broome: If the Court please, I do not believe that's what the witness testified.

The Court: Well, the witness can answer.

A. (Continued) I arrived in Cleveland. I registered in a hotel. The following morning I went to the International offices in Cleveland, at which time the resolution was presented to the staff members at that meeting. We proceeded to the council meetings. If you will recall the testimony, that is exactly what I testified to.

Mr. Francis: May I have the reporter read that answer back to me, Your Honor?

The Court: You mean this one here?

Mr. Francis: Yes, Your Honor.

The Court: Yes.

(The reporter read the last answer aloud.)

By Mr. Francis:

Q. Well, actually, yesterday you testified that you arrived in Cleveland and went to the International union offices on the same date, isn't that what your testimony was?

A. I don't think I stated that, same day.

Q. Well, your testimony is then that you arrived April 7th of 1948 and attended a Die Casting Council meeting on April 8th?

A. I didn't state that I arrived in Cleveland on the 7th. [fol. 116] Q. Well, then, tell us, on what day did you arrive in Cleveland?

A. I can't remember the exact date. It was the evening prior to the Die Casting meeting, Die Cast Council meeting, in the Hollanden Hotel.

Mr. Francis: If the Court will excuse me a moment?

(Defendant's Exhibit B was marked for identification.)

By Mr. Francis:

Q. I hand you, Mr. Locke, what has been marked for purposes of identification as Defendant's Exhibit B and

ask you to examine it and tell us if you can identify what it is?

The Court: The question was if you could identify what that is.

A. Oh, this appears to be a typewritten copy of an expense voucher. This does look like my signature. I think if you compare this with what you have on the other one, you will find no comparison.

Mr. Francis: I ask the last remark be stricken, Your Honor. There was no such question pending.

The Court: All right, the last part of the statement will be stricken from the record, of the answer.

Mr. Francis: We offer Exhibit B into evidence.

Mr. Broome: No objection.

The Court: The exhibit will be received into evidence.

By Mr. Francis:

Q. Now, in this voucher of yours which has been admitted as Defendant's Exhibit B, is it not true that you indicated that you had arrived in Cleveland on the 8th of April?

A. I didn't notice that date. I don't know how Kenneth Eckert got his signature on this.

Mr. Francis: I ask that last remark be stricken as not responsive.

The Court: The remark will stand. It doesn't make any difference. Let's get on with the cross examination.

[fol. 117] A. Yes, it shows I arrived in Cleveland on the 8th.

By Mr. Francis:

Q. Doesn't that also show that Mr. Kenneth Eckert approved this voucher?

A. This I have no knowledge of.

Q. Mr. Eckert's signature appears on Exhibit B, does it not?

A. That I have no knowledge of either.

Mr. Francis: May I display the exhibit to the jury, please?

The Court: No, but you can read it, if you want to.

Mr. Francis: Thank you, your Honor.

If the jury please, this white page is labeled "Expense Account. District Cast-Die Division, April 15, 1948." 1, meaning April 1.

"Detroit area: 55 miles, $2.20 and $9.00.
"April 2, Detroit area: 50 miles, $2.00; $9.00.
"April 3, Detroit area: 40 miles, $1.60; $9.00.
"April 4, Detroit area: 45 miles, $1.80; $9.00.
"April 5, Detroit area: 60 miles, $2.40; $9.00.
"April 6, Detroit area: 45 miles, $1.80; $9.00.
"April 7, Detroit area: 55 miles, $2.20; $9.00.
"April 8, Detroit to Cleveland, $8.00; $9.00.

Summary of the balance of that period comes to $55.60; total per diem, $135.00.

The expenses are itemized. Signature "Ralph Locke, 1000 Walnut Avenue, Cleveland, approved by Kenneth Eckert."

Now, this was a voucher then for your employment in movements up to April 15, 1948, is it not so?

A. I guess it is.

[fol. 118] Q. Mr. Locke, I hand you what has been marked for purposes of identification, what is marked as Defendant's Exhibit C. Will you examine it and tell us if you can identify it, please?

A. This is in my own handwriting. It is my expense voucher.

Q. And for what period of time?

A. The 10th of April to the 30th of April. But I did not submit this to Eckert.

Mr. Francis: Now, I offer Defendant's Exhibit C into evidence, Your Honor.

Mr. MacDonald: No objection.

The Court: The exhibit will be received.

Mr. Francis: If it please the Court, may I read the expense voucher portion just in summary fashion?

The Court: All right.

Mr. Francis: If the jury please: This white sheet is an expense account on printed form, International Union of Mine, Mill and Smelter Workers, period ending April 30 and indicates Mr. Locke's whereabouts in the Cleveland area from April 15 to April 30.

The amount of reimbursement asset down at the bottom is $163.86.

There is a carbon of that being made out to Mr. Locke by the Mining-Mill, International Union of Mine-Mill for that amount made payable to Mr. Locke signed "Ralph Locke, 1000 Walnut Avenue, Cleveland, Ohio; approved by Ken Eckert."

By Mr. Francis:

Q. Mr. Locke, in your testimony yesterday about the meeting in the Cleveland Hotel on or about April 9, 1948, you listed a number of people being present at that meeting, including a Bill Jackson. Do you recollect that testimony?

A. At that time I stated that I thought he was there.

Q. And you described this meeting in the Cleveland Hotel on April 9 as a Communist Party meeting, is that correct?

A. That's correct. I stated it was a meeting of Communist Party members.

Q. Do you recollect signing a statement and submitting a statement to the agents of the Federal Bureau of Investigation on or about March 20, 1955?

[fol. 119] A. I don't recall the date. I talked to agents of the Federal Bureau of Investigation on two or three occasions. I can't recall the date.

Q. I hand you this document, ask you if this refreshes your recollection as to the time in question?

A. (Witness reading)

Q. Have you examined the document?

A. Do you want me to read it in full or do you want to take it now?

Q. I ask you if you have examined the document?

A. I haven't finished.

(Witness reads, witness lays document down)

Q. Have you finished examining this document?

A. Yes, I have.

Q. Thank you. Does this refresh your recollection that you did on or about March 19, 1955, meet with some Government agents, agents of the Federal Bureau of Investigation?

A. I have testified to that already.

The Court: Well, just answer the question directly, Mr. Locke.

A. (Continued) I don't remember the date.

Q. Well, he asked you—

A. It has been years ago—

The Court: Well, he asked you if it refreshed your memory, if you did meet with them?

A. Your Honor, if he wants me to testify that I did meet with him on this particular date, I don't remember.

The Court: All right, then. Go ahead, Mr. Francis.

By Mr. Francis:

Q. Does an examination of this document indicate that you did make a statement to Mr. Charles A. Shaw and George F. Bickley of the Federal Bureau of Investigation on or about March 19, 1955?

A. I can't testify as to the date.

Q. But as to the rest of it, can you?

[fol. 120] A. There is some errors in this report in regards to dates. I did talk to a couple of them, on two or

three occasions, with the agents from the F.B.I.; yes.

Q. And you recognize this statement; that is what I am getting at?

A. I signed it.

Q. All right. At the time you signed this statement, Mr. Locke, do you remember whether you had doubts as to whether William Jackson was a member of the Communist Party?

A. I don't remember that.

Q. All right. I will ask you whether you recollect maybe this statement to those agents on or about March 19, 1955?

Mr. Broome: If it please the Court, if counsel is going to ask questions based on this statement, I think the statement itself ought to be offered in evidence.

The Court: Well, the objection will be overruled.

Q. I ask you whether you recollect making that statement, whether this refreshes your recollection on William Jackson.

"Set up below are officers of I.M.M.S. who I have concluded were very sympathetic to the C.P. cause, the period of time I knew them to be so inclined, as the reasons for my conclusion, which is to the best of my knowledge, William Jackson in 1948 spoke in a progressive fashion at Union caucuses and conventions."

Does that refresh your recollection, Mr. Locke?

A. No, it does not.

Q. Do you now testify that William Jackson who was in the hotel on the east side of Cleveland on April 9, 1948, was a member of the Communist Party?

Mr. Broome: If it please the Court, that, I think that misstates the testimony of the witness.

The Court: The objection is sustained.

Q. Was this meeting in the hotel on the east side of Cleveland, that you testified to, meaning April 9, 1948, a Communist Party meeting?

A. It was a meeting of Communist Party members only. [fol. 121] Q. And when you say it was a meeting of Communist Party members only, does that include William Jackson?

A. I told you previously that I thought he was there. Now, that's as far as I can tell you. I am doing the best I can.

Q. Tell us again, then, who was present in this hotel meeting on the east side of Cleveland, April 9th of 1948?

A. It was Joe Brandt, Communist Party functionary, was employed by the Communist Party. Maurice Travis, Irving Dichter, Ray Dennis, Jimmy Pinta—let's see—did I mention Dichter?

Q. Yes, you did.

A. Myself and all told, I think there were about twelve or fifteen or eighteen people.

Q. And did that include Bill Jackson?

A. I told you I don't remember.

Q. But you thought yesterday that he was there, is that correct?

A. I said I thought he was there. This is fifteen years.

The Court: You have answered the question, Mr. Locke.

Q. Who were the members of the staff of the International Union of Mine, Mill and Smelter Workers in Cleveland after April 9, 1948?

A. Irving Dichter was assigned there. Joe London, myself and Ray Dennis. Oh, the International paid part of his salary and the local paid a part of his salary at that particular time.

Q. That was the staff then on April 9, 1948?

A. There was one other fellow, I can't recall his name, but he was not a part of the International staff.

Q. When did this staff hold its meetings after April 9, 1948?

A. At first in the office of the International Union in Cleveland.

Q. Where were those offices?

A. In the C.I.O. Building.

Q. Where in Cleveland is the C.I.O. Building?

A. I can't remember the street.

Q. What floor of the C.I.O. Building were the offices of the International Union?

A. The second floor.

Q. The second floor. How many rooms constituted their offices?

A. Two.

Q. One would have been a reception room and another an office or what was it?

A. Yes, that's correct.

Q. How many people would normally be in these offices day-to-day?

A. The staff would be in and out and two secretaries.

Q. Do you remember their names?

[fol. 122] A. Well, we had a number of them after April 8, but Esther Houseman was the only one that was steadily employed there until she had to take time off.

Q. In which of these two rooms did the staff meet with Joe Brandt?

A. In the office.

Q. How big an office was this?

A. I never took the trouble to measure. I had two or three desks in there.

Q. And every morning Joe Brandt would sit down with the staff in Cleveland, is that correct?

A. I didn't say that. No, that is not correct. He did not sit with the staff every morning.

Q. Didn't you testify yesterday that immediately after this meeting in the hotel, the east side of Cleveland, that Mr. Dichter required meetings of the staff every morning or nearly every morning?

A. That's correct, of the staff.

By Mr. Francis:

Q. Now, how many of these did Joe Brandt attend, let's say, the balance of the month of April?

A. I don't recall the exact numbers, probably five or six times.

Q. Can you tell us when the first meeting took place with the staff after April 9th with Joe Brandt present?

A. I don't remember.

Q. You think he did sit at least five time with the staff in the month of April?

A. In the Mine-Mill office.

Q. Now, who would conduct the meetings when Mr. Brandt was present? Did Mr. Dichter conduct them or did Mr. Brandt conduct them?

A. I don't understand what you mean by conducting?

Q. Was there anyone in charge of the meetings?

A. Mr. Dichter and Mr. Brandt.

Q. In other words, Mr. Dichter and Mr. Brandt would jointly conduct these meetings when Mr. Brandt happened to be present?

A. Correct.

Q. This took place for approximately two months, I believe you stated yesterday on direct examination, is that correct?

A. That's about approximately correct.

Q. So that from April 9th to about June 9th or 10th or in that area, you would have the staff meetings in the mornings and with some frequency Mr. Brandt would also attend?

A. You are referring to the meetings in the International office only, aren't you?

Q. Yes.

A. That's correct.

Q. And in those two months, those meetings were conducted when Mr. Brandt was present jointly by Mr. Brandt and Mr. Dichter?

A. That is right.

[fol. 123] Q. What had happened to Mr. Eckert? Did he sit in on these meetings?

A. No.

Q. What was Eckert doing now with respect to this, the fight over the effort to obtain a secession?

A. What was he doing?

Q. Yes.

Mr. Broome: If the Court please, I think counsel ought to fix the time.

Q. (Continued) From April 9, 1948?

A. He had moved his office out of the C.I.O. Building into a neighboring building. What he was doing, I have no way of knowing.

Q. Well, then, I believe you testified yesterday, did you not, that following these staff meetings that met almost or nearly every morning, there would also be meetings elsewhere with Joe Brandt in hotel rooms in other locations?

A. I don't understand your question.

Q. In addition to these staff meetings with Joe Brandt, did you not testify yesterday that there were also meetings outside of the staff offices?

A. This was after the decision to keep Brandt out of the International office.

Q. I see, and at those meetings, were there people present other than the staff of the International Union of Mine, Mill and Smelter Workers?

A. Along toward the conclusion of the Alcoa campaign, just prior to the election, there were meetings where Joe Brandt was chairman which included the United Electrical Workers, some people from the United Electrical Workers, the Chemical Workers and the Mine, Mill and Smelter Workers staff. These meetings were chaired by Joe Brandt.

Q. So that you had not only the Mine-Mill staff there, but members of other unions?

A. On one or two occasions, we are referring to. I am not talking about throughout the period of the Alcoa campaign. We continued to meet with Joe Brandt, the staff of Mine-Mill individually—I mean, as a separate unit in other

locations other than the International office in the C.I.O. Building, because of the bad publicity it might create.

Q. When you attended this meeting in Chicago, Mr. Locke, did you know in advance that it was going to be a Communist Party meeting? I mean, did you know before you got to Chicago?

A. No.

[fol. 124] Q. What was the purpose then of your going to Chicago to see Mr. Travis?

A. I have testified to that already. I was instructed by Mr. Travis to come into Chicago and report on Eckert and the secession and what the Communist—he didn't—this came up in the meeting. I beg your pardon, this wasn't part of the telephone conversation. I was to come in, into Chicago, to report on the secession and Eckert and the condition of the local and particularly the Alcoa local, and I was to put this down for publication and in my expense voucher as a trip to Chicago to look over the situation in the new Alcoa plant in regard to organizing.

Q. What did you report as to the activities of Eckert at this meeting?

A. What meeting, sir?

Q. The meeting in Chicago.

A. Which meeting?

Q. The meeting at Mr. Travis' home in Chicago?

A. All right, now.

Q. What did you report as to Eckert's activities?

A. I reported that the Alcoa local was in pretty bad shape, that we were in danger of losing some of the other locals, and I outlined before this meeting what the Communist Party members in Cleveland were doing to aid and assist the International union in the fight with the U.A.W. at that time against the secession of the local, outlined the distribution of "The Daily Worker" at the plant gates, the assistance we got from the Party in distributing leaflets at the plant gate, and we also discussed the Taft-Hartley Act.

Q. Well, more specifically, what did you say as to what Eckert was doing? Give us as best you can what you reported about Eckerts' activities?

A. Eckert was doing the same thing we were doing, distributing leaflets.

Q. On whose behalf?

A. On behalf of U.A.W. They had the local. We didn't. Only thing we had was a contract.

Q. So, Eckert was distributing leaflets and working on behalf of the U.A.W.

A. That's the way it ended up. Originally, the local voted to secede from Mine, Mill and Smelter Workers and go into the N.A.D.C.W., which was the National Association of Die Casting Workers, which Eckert at that time was attempting to recreate. I don't know whatever happened to that. I don't think he got a charter from the C.I.O., so they went into the U.A.W. We had lost the local in a local meeting election, attended by most of the members, prior to the actual N.L.R.B. election.

Q. So that Ken Eckert in effect was acting on behalf of U.A.W. in this fight in Cleveland?

[fol. 125] A. Yes, he was leaving the local.

Q. And that is what you reported to this group in Mr. Travis' home in Chicago?

A. Right.

Q. And then when was there this Alcoa election? When did it take place?

A. I don't recall. I think at that time that I was working on the other Die-Casting locals in the area and in Cleveland and out of Cleveland, Cranwood, and places like that. I don't recall when the elections actually took place.

Q. Did the ladies who were present in Mr. Travis' home take part in these discussions?

A. Not that I recall.

Q. They just sat and listened?

A. As I recall, that's all.

Q. Were they also members of the Communist Party?

A. They were in a Communist Party meeting, or a meeting of Communist Party members. I thought that they were. One of them, I was introduced to as a Communist Party member. The lady with Henry Horowitz, I cannot

testify to, other than that she was at this meeting, which was a meeting of Communist Party members.

Q. How many people were in Mr. Travis' home on this occasion?

A. The ones that I have mentioned before, plus I would say maybe three or four other people that I can't recall their names anymore.

Q. Would you say they were men and women or just men?

A. Men, Chicago area.

(Defendant's Exhibits D and E were marked for identification.)

Q. Mr. Locke, I hand you what has been marked for purposes of identification as Defendant's Exhibits D and E, and hand them to you and ask you to examine them and tell us if you can identify what they are. Can you identify them?

A. They are my expense vouchers, and again I say I did not submit these to Eckert.

Mr. Francis: We offer Defendant's Exhibits D and E into evidence, Your Honor.

(Defendant's Exhibits D and E were shown to opposing counsel.)

Mr. Broome: No objection.

The Court: The exhibits will be received.

[fol. 126] (Defendant's Exhibits D and E were received in evidence.)

Mr. Francis: If the Court please, may I make brief reference to these to the jury?

The Court: All right.

Mr. Francis: Exhibit D, ladies and gentlemen of the jury, purports to be and is an expense voucher of Mr. Locke on an expense account form of the International Union of Mine, Mill and Smelter Workers, and is for the time of May 1, 1948 to May 15, 1948. The exhibit gives the amount of money coming to Mr. Locke for his expenses and per diem and is

signed, "Ralph Locke", where checks should be sent 1000 Walnut Avenue, Cleveland, Ohio, approved by Kenneth Eckert.

Exhibit E is again an expense account voucher form on printed form, showing the expenses of Mr. Locke from the 16th of May, 1948 to the 31st of May, 1948, and shows the amount paid to Mr. Locke and it is approved Ken Eckert.

By Mr. Francis:

Q. Was Mr. Travis satisfied with your report, after your report in his house?

A. You would have to ask him.

Q. Did he tell you that he was satisfied with your work?

A. No.

Q. He did not, and how long did you stay there in Chicago?

A. Just overnight.

Q. Was any plan made at that meeting as to how to combat Mr. Eckert and his work in the U.A.W.?

A. There was discussion of how to combat his activities, yes.

Q. And what were the proposals to combat Mr. Eckert and the U.A.W.?

A. To work more closely with the Party, enlist more aid from the Party and bring in other unions into the fight against the secession and keep up the campaign, make house-to-house visitations of the members of the Alcoa locals, and I think that's about the sum and substance of it. There was a lot of discussion. I can't recall everything that was said.

Q. Mr. Dichter did not accompany you to Chicago, did he?

A. No, he did not.

(Defendant's Exhibits F and G were marked for identification.)

[fol. 127] Q. I hand you what has been marked for purposes of identification Mr. Locke, Defendant's Exhibits F and G. Will you examine them and tell me if you can identify them?

A. These glasses will be worn out from taking them off and putting them on. This is not my signature, either.

Q. Which exhibit are you referring to?

A. E.

Q. Exhibit E?

A. F.

Q. Exhibit F?

A. Yes. This looks like my signature here.

Q. Which one is that?

A. G. This is not mine.

Mr. Francis: We offer Defendant's Exhibit G into evidence.

Mr. Broome: No objection.

The Court: No objection. It will be received.

Mr. Broome: If it please the Court, was that "F" that was received?

The Court: "G".

Mr. Broome: "G". Thank you.

By Mr. Francis:

Q. I am handing you Defendant's Exhibit G, Mr. Locke?

A. Isn't that the one I just had?

Q. Yes. Does that indicate you were in Chicago the second half of July?

A. No, sir, in Chicago on this. The one in May is the one that shows I was in Chicago. The 21st of May.

Q. Is that when the meeting in Chicago took place?

A. Yes.

Q. Do you remember what you testified to yesterday?

A. I thought it was in June. This is fifteen years. I am supposed to remember dates?

Q. Yesterday did you think it might also have been in July?

A. I testified I thought it was in June.

Q. Are you sure you didn't also say it was in June or July?

A. I could have.

Mr. Broome: If it please the Court, with Mr. Francis' permission, I would like to look at those last exhibits again, please.

Mr. Francis: Which one was that?

Mr. Broome: The last one; "F", "F" and "G".

[fol. 128] (Mr. Taylor presents to Mr. Broome Exhibits D, F and G.)

Mr. Francis: Shall I wait for the examination?

The Court: No, no. Let's go on.

By Mr. Francis:

Q. Directing your attention to your testimony yesterday in counsel for the Government at page 555 and 556, do you remember being asked these questions and giving these answers:

"Question: All right, sir. During the summer of 1948, Mr. Locke, did you have occasion to make a trip to Chicago?"

"Question. Do you remember when it was? Answer: I can't place the exact date. It was in the summer time."

"Question: Well, to the best of your knowledge? Answer: June or July, I guess."

"Question: All right. In 1948? Answer: I think it was around June. I am not sure of it."

Do you remember being asked those questions and giving those answers?

A. Yes, I do.

Mr. Francis: May I have a moment's recess for a moment. I want to assemble—

The Court: Well, I would have hoped you would have had it assembled so we could progress much more rapidly than we have this morning on this cross-examination. We will be in recess for ten minutes.

(Whereupon, the Court recessed at the hour of 12:20 P.M.)

By Mr. Francis:

Q. Mr. Locke, you remember giving testimony in this matter while under oath in 1959 before this?

A. What matter?

Q. In this same case.

A. 1959, yes.

Q. Do you remember what your testimony was then as to when this meeting in Chicago took place?

[fol. 129] A. As nearly as I can recall, about the same as the testimony I gave today.

Q. Which is what?

A. June, around June. I now find out it was May 21.

Q. Are you sure that you said it was in June when you testified the first time?

A. I said it was around June.

Q. All right. Do you remember these questions being asked you and your giving these answers:

"Question: Now, Mr. Locke, while you were working in the Cleveland area under Mr. Dichter, did you have an occasion to make a trip to Chicago?

Answer: Yes.

Question: Can you tell us as nearly as you can recall at this time when that was?

Answer: Possibly July or later. I don't recall the time exactly."

Do you remember that question and that answer?

A. I don't remember that.

Mr. Francis: No further questions of this witness.

Mr. Broome: There will be no redirect, Your Honor.

The Court: You are excused, Mr. Locke.

* * * * * * *

STIPULATION AND COLLOQUY RE DEATH OF WILLIAM MASON, WITNESS ON FIRST TRIAL

Mr. Maddrix: If it please the Court, the Government desires to present a foundation prior to asking permission of the Court to read to the jury William Mason's prior testimony, and at this time with your permission I would like to read the stipulation between counsel.

The Court: All right.

Mr. Maddrix: "It is stipulated by counsel for defendants and counsel for the government that one William (sometimes known as 'Bill') Mason was a witness for the Government in the above entitled case, that he testified at the trial of defendants at Denver, Colorado, on November 16 and 17, 1959, direct testimony on pages 1231 to 1296 of the transcript of record of that trial, cross-examination on pages 1423 to 1515 of the said transcript.

[fol. 130] "It is further stipulated that subsequent to his appearance in Denver as a witness as aforesaid, he died as a result of an automobile accident on October 25, 1962, north of Butte, Montana.

"It is agreed that the deceased is the same Bill Mason who testified at the original trial and it shall be unnecessary to offer further proof of this fact."

This is signed by Lawrence M. Henry, United States Attorney, Lafayette E. Broome, Attorney, Department of Justice, Telford Taylor, Attorney for Defendants, and Mr. Nathan Witt, Attorney for Defendants and I would like to also say that I recall Mr. Taylor making an addition to this stipulation by saying it would not be necessary for the Government to show and prove the accuracy of the transcript of his testimony.

Mr. Taylor: That's correct, Your Honor, it is not in the stipulation, but I would state on the record there would be no need to call the reporter, and we can acknowledge the authenticity of the record.

The Court: All right.

* * * * * * *

[fol. 155]

OBJECTIONS ON SECOND TRIAL TO ADMISSION OF MASON TESTIMONY

Mr. Witt: Will you give me a moment, please?

The Court: Yes.

Mr. Witt: If it please the Court, before I come back to the 3500 problem, I want to say, aside from that problem, and assuming that there is no error committed in the production of any of Mason's direct testimony or the exclusion [fol. 156] of the sustaining of objections to any questions on this cross-examination on the first trial, we think the principle of using the testimony of the dead man is wrong and should not be followed.

In that connection, we recognize in the present status of the law, we have no great hope that Your Honor will agree with us, but at least we want our position on that issue preserved for the record.

Even if that principle is followed and should be continuing to be the law, we think it should not be applied in the case of a witness like Mason. In this case, it was peculiarly important that the jury which was to pass on guilt or innocence of the defendants would have an opportunity to observe them, consider his manner on the witness stand, and be able to, as a part of the usual standards that are required to testimony, when given orally on the witness stand. And we think that is peculiarly true in Mason's case, because of the deep animosity and bitterness displayed on the witness stand against Mine, Mill and defendants and also, because of the large number of inconsistencies in his testimony, that even if the basic principle, which allows the permission of a dead man's testimony be correct, we think it should not be applied here.

And then related to this last point is the fact that Mr. Broome stated in Washington, and the SACB proceeding on one occasion that he did not intend to produce Mason as a witness in that proceeding and would not produce Mason again in any proceeding under any circumstances.

Whatever Mr. Mason's reasons were, we don't know and perhaps we will not have a statement here, but at least a record of these proceedings indicates that that was Mr. Broome's position at that time, I think it was either in 1960 or 1961.

In view of that, we have a situation here where Mr. Broome was saying in that position that he would never produce Mason as a witness again, so that if Mason were alive, if Mr. Broome still felt that way, he would not produce Mason here on the witness stand, but now, Mason has died and he is urging that testimony he gave four years ago to be admitted.

I don't understand that, the principle which permits the admission of the prior testimony of a deceased person is, of course, based on the notion that if the proceeding is between the same parties, involves the same issues, then if the witness' testimony has been subjected fully, under the right of cross-examination, under the circumstances, it should be admitted.

[fol. 157] But your Honor will recall that we had one serious issue in the course of Mason's cross-examination on the first trial, and that related to the matter which I touched on deeply in my examination of Mr. Zoeller this afternoon; that is, whether the fact that Mason was a naturalized citizen and was subject to denaturalization under the McCarran Act of 1950 has anything to do with his furnishing information to the FBI at the beginning of 1952.

We think, your Honor was wrong in his rulings with this to that line of cross-examination; that we recognize that the Court of Appeals have turned us down on that issue earlier in the second Travis trial and that the Court of Appeals in its opinion reversing the conviction in this case passed it by without comment.

We recognize what the status of the law is and at least it is our position that with your Honor's all due proper respect in the Court of Appeals, was wrong and we want to urge that again.

And, finally, before we get back to the 3500 problem, your Honor will recall that we made the motion for Mason's grand jury testimony in the alternative, as your Honor remembers; the testimony of Mr. Mason, which he gave before the two grand juries, the so-called grand jury in 1954 and the grand jury in this case in 1956.

Of course, if Mason were alive and were on the witness stand, we would renew those motions, but we think your Honor's denial of those motions on the first trial was erroneous and the decision of the Court of Appeals upholding that denial was erroneous, and for that reason we think we would deny the full right of cross-examination on the first trial.

And, finally, aside from all those matters, we do have this 3500 question, which your Honor will consider this afternoon.

* * * * * * *

[fol. 219]

COURT'S RULING ON SECOND TRIAL ADMITTING MASON TESTIMONY

The Court: Therefore, this point does not affect the admissibility of the testimony, this (18) 3500 problem. It is out of the way now, under the Court's ruling, so from that standpoint the case or the matter is properly admissible, and there has been a proper showing to the Court or a satisfactory showing by stipulation at least that Mr. Mason is deceased, and is the same deceased person, is the same William Mason, who testified at the previous trial in this case in 1959. Therefore, it is the ruling of this Court that the testimony as contained in the official transcript of the proceedings may be read to the jury in this case, as the testimony of William Mason.

* * * * * * *

PART OF GOVERNMENT'S EXHIBIT No. 2
READ TO THE JURY

Mr. Broome: May this document be marked as Government's Exhibit No. 2?

(Government's Exhibit No. 2 was marked for identification.)

Mr. Broome: May it please the Court, we offer in evidence Government's Exhibit No. 2, being the minutes of the International Executive Board of the International Union of Mine, Mill and Smelter Workers, a meeting on April 26 to 29, 1948, in the Hamilton Hotel, Chicago.

[fol. 220] Mr. Taylor: Your Honor, Mr. Broome showed me this previously, and as with the other exhibits that come from the files and records, we have no objection on authenticity, no need to prove it by a witness or anything. We do object on the grounds of irrelevance and lack of probative value and the lack of any materiality to the case.

The Court: Let me see it.

(Document handed to the Court.)

The Court: The objection will be overruled. The exhibit will be received.

(Government's Exhibit No. 2 for identification was received in evidence.)

Mr. Broome: May it please the Court, I would like to have permission at this time to read certain portions of this exhibit with the understanding, of course, that if counsel so desires they may read any other part of it that they wish.

The Court: All right.

Mr. Broome: "Minutes of the International Executive Board, International Union of Mine, Mill and Smelter Workers—C.I.O. April 26-29, 1948, Hamilton Hotel, Chicago, Illinois, Monday, April 26, 1948.

"The meeting was called to order at 10:20 a.m. by President Clark. The following officers and Board Members

were present: John Clark, President; W. J. Madill, Vice President; M. E. Travis, Secretary-Treasurer; William Mason, Board Member District #1; Orville Larson, Board Member, District #2; Jesse Van Camp, Board Member District #3; Leonard Douglas, Board Member District #4; Albert Pezzati, Board Member District #6; Chase Powers, Board Member District #7; Robert Carlin, Board Member District #8; Ken Eckert, Board Member, Casting Division.

"Also in attendance were the following—

Mr. Witt: Excuse me. May we have a moment at the counsel table?

The Court: All right.

[fol. 221] Mr. Witt: May we approach the bench?

(The following proceedings were had at the bench out of the hearing of the jury:)

Mr. Broome: Mr. Witt has requested that I omit reading of his name as having been present there and I have agreed to it.

(The proceedings were resumed within the hearing of the jury.)

Mr. Broome: "Also in attendance were the following staff members: Bernard Stern, Research Director; Harold Sanderson, Research Department; Morrie Wright, Editor; Graham Dolan, Educational Director; Sam Feldman, Educational Department, Al Skinner, Political Action Director; Henry Horowitz, Press Department.

After a brief recess, the meeting reconvened at 4:30 p.m. All Board Members and staff personnel previously listed were in attendance. In addition, the following Casting Division members were present:

Alfred Bartnikowski, Ernest Love, Richard Moorehead, Cliff Lanzinger, Walter Gilmore, Edward Radden, Ray Dennis, Max Alexander, and Irving Dichter.

"President Clark stated that the visitors were here on a matter of vital concern to the entire International Union. He said that the last convention took action that we do not

sign the Taft-Hartley affidavits and that we stay clear of the present National Labor Relations Board. Subsequent International Executive Board meetings have reaffirmed the position taken by the convention. However, in view of the resolution presented by Board Member Eckert to a recent Casting Conference, calling for compliance with the Taft-Hartley affidavits, the whole issue must be thoroughly gone into. He stated that any local had a right to advocate compliance, but that officers of the union and staff members are obligated to carry out the policy of the International Union, and that Brother Eckert should have presented his resolution to the Board before going to the Council with it. President Clark requested Brother Eckert to explain why the resolution was presented to the Casting Council meeting.

[fol. 222] Board Member Eckert stated that the prior presentation of the Resolution to the Casting Conference before coming to the Executive Board with it was not, in his opinion, any violation of International policy, that he was merely advocating that the policy be changed. He stated that there was no basic difference between a union law in this respect and a civil law. He said that he knew that if he came to this Executive Board and voiced such an idea (that the International should file the Taft-Hartley affidavits) he would be accused by some of the Board members and the Casting Division staff members as not speaking for the Casting Division and that therefore he felt that it was necessary before advocating that policy before this Board that he have them on record in order to substantiate any proposals he might make to the Board itself.

Secretary-Treasurer Travis spoke and repeated the remarks which he had made at a staff meeting earlier this month. He stated that raising this issue now in the manner in which it has been raised will do untold harm to the contract negotiations now opening in the various sections of the union. Secretary Travis also read a section of the organizational report of Vice President Robinson bringing out *certak* weaknesses in the preparations for the Precision strike.

President Clark then asked to hear from the Casting Division members and staff members and stated that following that, the Board would resume its executive sessions and resolve the question.

Brothers Ray Dennis, Max Alexander and Edward Radden spoke against signing the affidavit and stated that Board Member Eckert was wrong in presenting the resolution to the Casting Division at a time when the critical Precision strike was on. Brothers Love and Bartnikowski spoke in favor of complying with the Taft-Hartley affidavits. Counsel Witt, Brothers Dolan and Feldman also spoke on the matter of the handling of the Precision strike and the mistake of raising the issue of Taft-Hartley.

Brother Dichter spoke on the Precision strike and the harmful effect of the resolution presented by Brother Eckert on the strikers. He stated that a real educational job should have been done from the very time that the company notified the union that it would not bargain. He stated that he didn't place the responsibility for the failure to do this on any one person.

[fol. 223] He stated that none of the die casting locals had been informed that such an important issue was to come before the Casting Conference, and that no staff member had been consulted on the matter, except Zvara, who is supporting Brother Eckert's position. He stated that this was not the democratic way of doing things, that employers were directing the campaign within the labor movement on the issue of compliance, and were using this issue to weaken and divide the unions, and that mere compliance would never satisfy the employers, or the unions raiding our organization, that from that point, the International would have to give up all of the principles it stands for, and by the time it did that, there would be no union left to fight for. He said the present division was giving heart to every employer with whom our International has contracts and would spur on their arrogance in negotiations.

Tuesday, April 27, 1948

President Clark called the meeting to order at 10 a.m. All officers and board members previously listed were present. Board Member of District #5 Wilson and Vice President Robinson were absent. In addition, members of the staff were present, and the visitors from the Casting Division.

The discussion on the Taft-Hartley affidavits and the presentation of the Resolution to the Casting Division by Board Member Eckert was resumed.

Vice President Madill stated that all the members of the Board were familiar with his position on the question of the affidavits, that he was in favor of compliance, but that as long as it was the policy of the International Union to be against compliance, it was his duty as an officer to carry out that policy.

Board Member Eckert again stated that in his opinion he was within his rights in presenting the resolution on compliance to the Casting Conference before coming to the Board. Brother Love defended Board Member Eckert's position and said that the Doehler locals were in favor of compliance with the affidavits.

Board Member Powers stated that there was no question that the feeling on the Executive Board not to comply with the Taft-Hartley law was overwhelming, and that all of the [fol. 224] Board members had expressed themselves on the question frequently and defended the position of the International on non-compliance. He stated that all of the Board members were capable of doing their own thinking, on the matter, and that the convictions which he held on this issue were as a result of conclusions reached that it was a correct policy, and that the accusation that the Board Members had changed was incorrect, that instead it was Board Member Eckert who had changed.

At this point, Brother Frank Clark, of Local 758, spoke briefly, and stated that it was the position of his local that Board Member Eckert was incorrect in presenting the resolution to the Casting Division and that if more energy

were spent educating the membership of the Casting Division on the issues involved in complying, the turmoil created over this issue would not exist and instead the Casting Division members would be concentrating on wage and contract negotiations and matters of vital interest to the membership.

Brothers Dennis and Dichter also spoke at this point and warned that a split over this issue would play directly into the hands of the employers.

Board Member Pezzati condemned what he said was an attempt on the part of Board Member Eckert to place the blame for opposition to Eckert's changed position on one or two individuals. Brother Pezzati stated that it was clear that almost the entire Board felt the strongest disapproval of Board Member Eckert's changed position on Taft-Hartley, and also on the manner used in presenting his changed position.

Board Member Mason spoke on the fighting traditions of the Mine-Mill membership and stated that there was no more democratic union in America than Mine-Mill. He stated that there were two issues before the Board: first, the issue of the International's position on the signing of the affidavits, and second, the relationship between Board Member Eckert and the rest of the Board. He said that there could be no compromise on the first issue, that the union must remain firm on its position of non-compliance. He deplored the disruption that has arisen over the issue and stated that far from stopping raiding by other unions, the confusion and division of the membership over the issue would further encourage raiding.

[fol. 225] Brother Skinner spoke on the need for devoting all our energies to present negotiations to improve the working conditions of our membership and stated that the present disruption created over the signing of the affidavits was a boon to the employers since it would present our union in a weakened position. He pointed out that so far this year there has been only one good settlement in the Casting Division. In other cases, the employers are taking

advantage of the split in our ranks to deprive the membership of benefits. He stated that the Resolution has done untold harm to all negotiations this year. If a proper educational job had been done, the membership of the Casting Division would not now be expecting short cuts and legal gimmicks to solve the problems of Taft-Hartley and would rely, instead, on their own strength.

"Secretary Travis then urged the Board members and visitors to resolve the issue without sacrificing the principle involved and the welfare of the membership.

Brother Bartnikowski stated that he wanted to bring back to his local a recommendation of the Executive Board that they comply with the Taft-Hartley Act.

President Clark stated that he had criticized Board Member Eckert for not coming to the Executive Board with his position on Taft-Hartley, and that Brother Eckert's position in introducing a resolution calling for compliance at the last Casting Conference was wrong and could not be defended. He stated that he wanted the minutes to show the positions of the absent officers on the question of compliance, namely Vice President Robinson and Board Member of District # Charles Wilson.

"He read a statement submitted to the Board by Brother Robinson, in which Brother Robinson wrote 'I am more convinced today than ever before that we must fight to the last ditch against the use of this anti-union law. We must not, in the interest of our membership and organized labor become just another union falling into its ruinous trap. We would be working against the interest of the membership to at this time upset the decision of the St. Paul convention and capitulate to the reactionary drive against labor by signing the yellow dog affidavits . . .'

"President Clark then stated that Brother Charles Wilson had requested that the position which he espoused at a staff meeting in Chicago two weeks ago be presented to the [fol. 226] Board, that he was unalterably opposed to compliance with the Taft-Hartley Act in any form, including the signing of any affidavits.

"Brother Clark then stated that he would be glad to express some opinions of the shop paper and other material being put out by the Schultz—" Pardon me, I think that is a part I will omit. If you wish to read this, you may.

"Board Member Eckert stated that he wanted to reiterate his position. He said that he thought that the International should comply with the signing of the affidavits, but this was tactically necessary, that he did not expect it to stop raiding but that it would give the union a tactical advantage. He said that he thought this was a democratic union and that this issue could be settled at the convention. He said that he had not engaged in red baiting and did not intend to do so. He said no local in the Casting Division, except one, was talking of secession and that he would not lend his name to circularizing the local unions on this or other issues, and that he would try to prevent it.

"Brother Pezzati stated that it was apparent that nobody's mind was going to be changed by any further discussion but that there were two points which had not been raised yet. One was that the nature of the red-scare was not sufficiently understood if anyone thought that merely by signing an affidavit this union or any union would be left alone to continue its trade union functions. He pointed out that this was merely the first step, and that following that, everyone who stood in the way of the employers would be labeled a Communist and driven out of the labor movement. The second point was that although Brother Eckert said that the resolving of the Taft-Hartley issue should be left to the convention, that the employers, now that it had been raised, would not let it rest, and that from now on, would continually press it to their own advantage. He said that a split in the progressive ranks now is the greatest service a union can give the employers.

"Board Member Van Camp stated that he also was opposed to any compromising of the International's program on the basic policy of Taft-Hartley, and that he felt that further discussion was useless since it was obvious that no one would change his position on this question. He stated

that as a Board Member, Brother Eckert was obligated to carry out the policy of the International Union and that since Brother Eckert has stated that he will continue to advocate compliance while the position of the International [fol. 227] is noncompliance, that therefore other members of the Casting Division International staff must be authorized to bring and explain the International's position to the rank and file. He stated that he was in agreement with the thinking that Brother Dichter should be assigned to Cleveland to bring the International's position on this question to the Casting locals in that area.

"Motion by Travis, Seconded by Mason, Van Camp, Larson, Powers, and Pezzati, that we reaffirm the position of the International Union in its action originally taken at the St. Paul Convention and at subsequent Board Meetings to the effect that we are opposed to using the National Labor Relations Board and filing the information necessary to use it and that in lieu thereof we will use the means outlined in our program adopted by this Board Meeting for satisfying the needs of our membership.

"Brother Madill stated that he was opposed to the motion and wanted the record to show the reasons for this.

"Madill: 'I didn't think yesterday to begin with that we reaffirmed that position in adopting the report of the President. I don't think that was a recommendation in any sense of the word. As a matter of fact, it is, according to procedure as I understand it, out of order any way. The motion should have been to accept the reading of the report of the President, not to adopt the report itself. I don't agree with that section of the report. I just agree with some of the reasoning of the rank and file that they ought to have a chance to fight the Shipbuilding Workers on an equal basis. If it weren't for the question of raiding, I would never consider using the Board. If we were in a better position, such as UE, without secession movements, I would be in agreement with the International's position on this. I don't think anyone here that knows strategy will deny that at times retreat is necessary in any strategy. Despite my

position, I say frankly, and I am willing to carry it out, that if the Board does vote for this motion, which there is no doubt it will, I will go out and fight like hell for that position. I won't make any reservations.'

"President Clark stated that he was also of the definite opinion that no officer could go out in the field and flaunt the policy of the International Union as outlined at the last convention and Board meetings. He said he was opposed to the action of Brother Eckert since every company with whom we bargain will now know that there is a serious split in the ranks and will use it against us in our negotiations. [fol. 228] "Motion carried, with two dissenting: Brothers Eckert and Madill.

"Motion by Travis, seconded by Powers, that the action of Board Member Eckert in submitting a resolution calling for using the facilities of the National Labor Relations Board and supplying the necessary information to enable that, the submission of that resolution to the Casting Conference without prior submission to this Executive Board or prior consultation with the officers of the International Union be repudiated. Motion carried with one dissenting, Brother Eckert."

Mr. Broome: That completes the reading of the exhibit.

* * * * * * *

[fol. 267]

PARTS OF GOVERNMENT'S EXHIBITS NOS. 4 AND 5 READ TO THE JURY

Mr. Broome: May it please the Court. May this document be marked as Government's Exhibit No. 4? And may this document be marked for identification as Government's Exhibit No. 5?

(Government's Exhibit Nos. 4 and 5 were marked for identification.)

Mr. Broome: If the Court please, we now offer in evidence Government's Exhibit No. 4.

Mr. Taylor: No objection on authenticity, same objection on relevance.

The Court: May I see the exhibit, Mr. Broome?

(Document handed to the Court.)

The Court: The objection will be overruled and the exhibit will be received.

[fol. 268] (Government's Exhibit No. 4 for identification was received in evidence.)

Mr. Broome: May we have the Court's permission to read portions of this exhibit to the Jury?

The Court: Yes.

Mr. Broome: Ladies and Gentlemen of the Jury, I am reading a portion of the minutes of the International Executive Board of the International Union of Mine, Mill and Smelter Workers for May 29 to June 1, 1948, at Denver, Colorado.

"This session consisted of a meeting of the National Wage Policy Committee. The following members of the Committee were present: Mining, Smelting & Refining: John McLeod, Local 1; Lou Cochran, 25; J. Vincent, 109; Verne Reese, 392; C. D. Smothermon, 415; and David Valasquez, 616. Brass Council: J. Corriveau, Local 623; John Cartenuti, 423; Ernest Gunsalus, 593; and William McNish, 445. Casting Division: William Jackson, Local 758; Morris Mazer, 701; Lee Gorelick, 700; Joe Chick, 715; and Pete Zvara, Reg. Dir.

"International Executive Board Members: John Clark, President; Reid Robinson, Vice President; Wesley Madill, Vice President; M. E. Travis, Secretary-Treasurer; William Mason, Board Member, District #1; Orville Larson, Board Member, District #2; Jesse Van Camp, Board Member, District #3; Leonard Douglas, Board Member, District #4; Charles Wilson, Board Member, District #5; Albert Pezzati, Board Member, District #6; Chase Powers, Board Member, District #7; Ken Eckert, Board Member, Casting Division; and Nathan Witt, International Counsel.

"President Clark called the meeting to order at 8:30 p.m. and spoke briefly on the bargaining reports heard by the Enlarged Conference and the need for working out a co-ordinated program for all the major councils.

"Secretary Travis presented for discussion and approval a program to guide the International Union during the next few months, during which contract negotiations would be under way in all areas. (The text of the Program is contained in the 'majority report' presented to the Enlarged Bargaining Conference on the following day, May 30, 1948.) [fol. 269] "Motion by Travis, seconded by Cochran, to adopt report and present to conference.

"Discussion on the motion:

"Brother Zvara stated that he was not in disagreement with all of the Statement, but he could not agree that the Casting Division Chairman is advocating a policy detrimental to our union, nor that he wanted to interfere with negotiations or any strike action. He said they were ready to strike for a contract, and that Brother Eckert and he were advocating a change in policy in order to protect the union from raiding. He stated he did not advocate secession, that he never has and would not in the future, and that he wanted to keep the organization together. He said refusal to comply with the Taft-Hartley affidavits meant rapid death for the union, while compliance meant slow death, that that was the alternative.

"Brother Pezzati said he supported the motion and said it was time to face the realities of the situation, that there was no longer a Wagner Act, and that we could no longer expect to save locals by dropping ballots in a box or run to the War Labor Board, and that the Statement says we must be prepared to fight, and not with legal gimmicks.

"Brother Powers supported the motion by stating that it represented the thinking of the overwhelming majority of the locals in District #7. He said the fact that the employers were anxious for us to comply was the very thing that was making the membership in his district determined that it would be wrong to do so.

"Brother Travis stated that the reasons our union was hated by the employers was because of its militancy, which was also the reason why this union has steadily obtained gains for its membership, and that we must continue fighting for the union and for political freedom.

"Brother Madill stated that he thought his position was correct, that he was opposed to the motion and that if we did not comply we would lose large sections of the union through raiding. He stated he intended to resign if the position of the International on compliance is not changed. [fol. 270] "Brother Eckert also spoke against the motion, stating he, too, thought it was necessary to sign the affidavits to make it easier to fight raiding.

"Brother Van Camp stated he was in favor of the entire Statement and that as long as a realistic, fighting program was maintained, the International would be able to get through the next difficult period.

"President Clark called for a vote on the motion.

"Motion carried with Eckert and Madill dissenting and Brother Reese abstaining."

At this point may it please the Court, I would like to offer in evidence Government's Exhibit No. 5.

Mr. Taylor: Same objection, Your Honor.

The Court: May I see the Exhibit, please?

(The following proceedings were had at the Bench, outside of the hearing of the Jury:)

Mr. Broome: Counsel have agreed that this is the report that is mentioned in the exhibit we just read from. That's the majority report.

The Court: All right.

Mr. Taylor: So stipulated, yes.

(Counsel returned to their places in the courtroom and the following proceedings were had within the hearing of the Jury.)

The Court: Exhibit 5 will be received in evidence.

(Government's Exhibit No. 5 for identification was received in evidence.)

Mr. Broome: If the Court please, I would like to have permission to read this exhibit to the Jury.

[fol. 271] The Court: You may, if you will wait just a moment. I think counsel are engaged.

(Counsel conferred.)

Mr. Broome: May I proceed?

The Court: Yes.

Mr. Broome: "This is the third successive year in which the bargaining program of our International Union has been undermined by internal disruption at a time most advantageous to the employer.

"In 1946, it was a campaign to remove President Robinson from office, led by the people who later removed themselves as secessionists. In 1947, it was the secession movement itself. Now in 1948, we find that new crop of secessionists and disruptors have grown out of the weeds of dissention. This new crop, like the others before them, are not very resourceful. The same dividing tactics, even the same issue, the familiar 'red herring,' is the springboard from which they hope to deliver our Union into the hands of the employers.

"This year the made-to-order Taft-Hartley law enables them to give direct aid to the employers without appearing to do so. The fundamental question of the right of any member of this union to hold office, or even more fundamentally, the right of the membership to select whom they please for officers, has been involved in previous years' struggles. The issue is nowhere stated more clearly than in the Preamble to our Constitution, under which this Union has functioned for fifty years or more.

"In 1946 we found Driscoll, Mankowski, Verdu and Leary fighting to change this fundamental. In 1947 they were joined by Homer Wilson and others. In 1948 we find Eckert and Madill in their ranks.

"The fight is never made as intensely as it is just a few weeks before contracts are due to expire. This year, because employers have the aid of the Taft-Hartley law and are more than ever concerned about protecting their fabulous profits by keeping wages down, they throw their full weight in with those who hope to destroy the democratic ideals of this Union. Consequently, we find ourselves with the long-fought-for program of National Bargaining with the major operators in fatal danger. National bargain-[fol. 272] ing calls for unity in our ranks to face the united action of the employers. Obviously, as every honest worker knows, we can't have a unity so long as some in our ranks seek to make a company union out of the International Union of Mine, Mill and Smelter Workers.

"The best solution to the bargaining problems which face our union today, in fact, the only one which can be fully effective in terms of achieving maximum gains for the rank and file, is a united effort on the part of every local union, every officer and staff member, to force the employers to bargain for fear of the fighting strength of our Union.

"National bargaining with the major operators, coordinated throughout our jurisdiction and inspired by an adamant refusal to yield to employers' 'patriotic' tests, is the only way the best interests of our membership can be served. Such a program calls for mobilization of our membership in every bargaining division of our Union. It is our deepest conviction that if the workers in the Utah-Nevada area, in the Southwest and the Rocky Mountain area, in Montana and the Coeur d'Alene, in the Tri-State and the Lead Belt, in the zinc plants, in the casting industry, in the brass fabrication industry, and everywhere else in our jurisdiction realize that wage and contract gains can be achieved only by united struggle, by taking strike votes, and in some instances by fighting on the picket lines, victory will be within our grasp.

"On the other hand, failure to recognize the necessity of fighting—capitulation to the hypocritical attempts of the employers to subjugate our Union to a phoney patriotism —will lead not only to fruitless bargaining but inevitable

destruction of our organization. The extent of our ability to protect our Union against its enemies and make wage and contract gains will be measured in exactly the same proportion as our ability to fight.

"With every ounce of sincerity and conviction which we are able to convey, we urge every local union in every section of our jurisdiction to join in this fight. Should there be those that are unwilling to fight—who are not influenced by the importance of the long-standing struggle for national bargaining or by our traditions as a fighting democratic union, but who are willing to bow in obedience to the demands of the employers, then we must know it now and take the necessary steps to achieve victory despite these weak and cowardly elements. These steps call for the following:

[fol. 273] "1. Every local union and bargaining group which has not already done so must begin bargaining immediately on all issues.

"2. In cases where companies refuse to bargain because of so-called 'loyalty' tests, Taft-Hartley or otherwise, or where companies fail or refuse to reach satisfactory agreement on our wage and other demands—

"a) Strike votes must be taken at strategic times determined by consultation with the officers.

"b) Community meetings must be held to rally people in support of our position.

"c) Every type of pressure must be exerted in the plant.

"d) Leaflets and other means of publicity must be used to expose the company.

"e) The company's record on refusal to abide by the Wagner Act and other law violations must be fully exposed.

"3. All bargaining must be coordinated through the facilities of the national office of this Union by—

"a) The publication of weekly bulletins on bargaining developments.

"b) Prohibiting local settlements without the approval of the Board Member and national officers.

"c) Holding the situations where strike votes have been taken until such time as the maximum pressure can be exerted on the industry or company simultaneously.

"d) Attempting to secure uniform settlements in all cases.

"e) Making every effort to get counter-proposals from companies, particularly on the issues of wages and health and welfare programs.

"f) Calling a meeting of the National Wage Policy Committee prior to June 30th to review the entire situation and determine further strategy.

[fol. 274] "g) Authorizing the National Wage Policy Committee to call industry-wide strikes or such a series of regional and company-wide strikes as seem advisable.

"4. In line with our previous program, every local should take steps to build an adequate strike fund.

"5. This conference of all local unions should go on record against the Mundt Bill, which is the greatest step yet attempted in this country to establish a labor front and invoke fascism by means of legislation. Again, as in the case of the Taft-Hartley affidavits, this legislation is not aimed only at Communists. This bill embraces within its terms every person, every organization with any ideas to the left of the N.A.M.; it gives the Attorney General the power of life of death over every organization, including unions; it is unconstitutional as an obvious interference with freedom of speech, freedom of assembly, even freedom of thought. It is the most unconstitutional, undemocratic, pro-fascist proposal every advanced seriously in the halls of Congress. It must be defeated!

"As has been clearly brought out in this meeting, the question of the Taft-Hartley affidavits is not the real barrier in the way of successful bargaining. The real barrier is our Union's failure to carry out a fighting program

against the employers. Signing of all the affidavits in the world will have no effect whatever on the determination of the employers to destroy our Union, deny contract gains and reduce the standard of living of our members. As a matter of fact, exactly the contrary is true.

"We never felt more strongly than we do today that signing the affidavits at this time would so weaken our Union that the employers would have us completely at their mercy.

"In the first place, signing the affidavits would mean that this International Union would soon be changed from a fighting, militant, progressive union to a compliant, spineless organization unable to protect its members. In the second place, signing the affidavits would not stop raiding; this Union is being raided not because it has not signed the affidavits, but because it has consistently followed progressive policies. We can be raided successfully only where we are weak; signing the affidavits will not strengthen weak locals, but it will further weaken them. In the third place, if we sign the affidavits and still somehow continue to be a fighting, progressive organization, the Taft-Hartley Labor [fol. 275] Board will still discriminate against us, the employers will still use the law against us; where we want quick elections, they will be delayed, and where we want them delayed, they will be held quickly. And finally, who is there to say that once we sign, our profit-swollen, monopoly employers will give us substantial wage increases, a decent health and welfare program, and the other benefits to which our members are entitled? No, signing the affidavits will solve none of our problems; instead, it will add to our problems and will deepen those we already have.

"We, therefore, take the position that the final determination of our position on the affidavits is for the International convention of our Union to be held in San Francisco in September.

"The rank and file of our Union expressed themselves at the last convention in St. Paul as being opposed to our union using the facilities of the National Labor Relations

Board. This action of the last convention instructed the officers of this Union specifically not to sign the so-called affidavits and your officers are inclined to be guided by these instructions. The rank and file, if it so desires, will have an opportunity to change these instructions at the coming convention of our International Union."

That concludes the reading of the exhibit. Your Honor, I would read briefly certain additional excerpts from Government's Exhibit No. 4.

The Court: All right, you may.

Mr. Broome: "President Clark stated that it was obvious that for the period of the crucial negotiations at least it was going to be necessary to be mobile in the transfering of forces, and that to accomplish this it was imperative that there be greater centralization of staff direction. He said that there would be some changes in the overall direction and coordination of the International's program. He appointed Brother Robinson to be in charge of coordination of bargaining, and Brother Travis, to be in charge of organization and direction of staff, both to work under his supervision."

"Casting Division—Assign Dichter to Cleveland area immediately, to be replaced in New York area by Eric Hagstrom. Determine what is needed for Chicago Alcoa plant. If organizer should be added, London should handle assignment. Employ Ray Dennis to work in Cleveland area."

[fol. 276] "Secretary Travis raised the question of a telephone bill which Board Member Eckert had put on his personal expense voucher, in the amount of $119.84. Brother Travis stated since the bill represented calls made on the office phone, it should have come out of the budget, in conformity with the policy in effect for all districts.

"Motion by Pezzati seconded by Powers that the telephone bill be deducted from next month's Casting Division administrative budget. Amendment to motion by Robinson seconded by Larson that Brother Eckert be instructed not to ask any local union for the money to pay this bill as he

stated he would do. Amendment and motion carried with Eckert dissenting."

That concludes the reading of the exhibit.

COLLOQUY BETWEEN COURT AND COUNSEL

(The following further proceedings were had at the Bench out of the hearing of the Jury.)

Mr. Broome: We have now reached the point where we are ready to proceed with the reading of Mr. Mason's testimony. I was thinking perhaps some explanation should be made to the Jury by the Court with respect to the situation. I don't know just what, but it would be in the discretion of the Court.

The Court: Well, I would propose unless counsel have some objection to it, to state that Mr. William Mason is deceased, that at a prior trial he gave certain testimony which was recorded, and that the Court has determined that that testimony may be properly admitted in this trial, and you would proceed to read his testimony into the records.

Mr. Taylor: It seems to me that that should be coupled, Your Honor, with an admonition that this is no different, that this does not vouch for the truth of it any more than any other testimony, they are to weigh this against the other testimony and not give it any greater weight because of the fact it is being read. They are liable otherwise to think it is some kind of document.

(Conversations off the record.)

Mr. Witt: Is Your Honor at ease, so I can address myself to another problem about Mason?

The Court: Yes.

[fol. 277] Mr. Witt: In going over it since yesterday, it occurred to me we hadn't settled how we would handle the remarks of the Court? Does Your Honor expect to play himself in this production?

Mr. Taylor: And Mr. Witt play himself and each one say what he said before?

Mr. Witt: Yes, well, it would be easier if Your Honor said what he said as shown on the first trial.

The Court: The problem is, I stated I would permit counsel to use my copy of the transcript, so I will not have the transcript before me.

Mr. Francis: Why not have Mr. Broome read the whole thing?

Mr. Witt: Up to cross?

The Court: This transcript wasn't made a part of the record on appeal, or was it, do you know?

Mr. Taylor: I think you checked that, and I'm sure it was.

Mr. Witt: I don't think any of it was roughed out of the record on appeal, so if Your Honor has a copy of the record on appeal.

The Court: Yes, I could probably use the record on appeal for mine.

(Counsel conferred among themselves.)

Mr. Witt: If the Court please.

The Court: Yes?

Mr. Witt: We think it would be preferable if Mr. Broome handled the direct examination, reading the questions and answers and colloquy, everything that appears as part of the direct, and I do the same job on cross, instead of going through this artificial business of putting a personality on the witness stand and that kind of thing.

The Court: What's your feeling, Mr. Broome?

[fol. 278] Mr. Broome: It would spare me a little burden of reading, if we could do it the other way.

Mr. Witt: You could break it up and put one of your associates on, the same way I expect to get tired.

Mr. Francis: Normally, the way I have seen it done, is just have counsel read the whole thing instead of playacting it out.

The Court: On depositions?

Mr. Francis: Depositions.

The Court: But that isn't the way we do it in this Court, we ordinarily—

Mr. Witt: On depositions, now they are a little different.

The Court: —have one lawyer play the part of the witness and sit in the witness box and the Jury are able to follow it much better.

Mr. Broome: I think that's a fact.

The Court: I am going to permit you to proceed on the basis of using it as a deposition. That is, if you want to. You can propound the question, the person can give the answer as it appears verbatim in the record.

Mr. Broome: Yes, all right.

Mr. Francis: Well, then, would that require us to get to our feet when objections are made or just have Mr. Broome read the objections?

Mr. Broome: I have no feeling about that. If they want to make the objection—if they want me to read it, I will read them.

Mr. Witt: If counsel will handle it, and myself on cross-examination, if counsel will make the colloquy. It just makes it more artificial.

[fol. 279] Mr. Taylor: We have got to be careful the only colloquy heard at the trial is read to the Jury, because there are various other parts.

Mr. Broome: I hope somebody will stop me if I start making a mistake.

(Conversations off the record.)

The Court: Do you have anything else, gentlemen?

Mr. Francis: I think we are ready to hea. the testimony.

The Court: Here is the direct, the transcript.

Mr. Witt: I thought Your Honor was considering whether Your Honor will say the same things at the same places as in the first trial. We left that open.

The Court: Is that what you want?

Mr. Witt: I think it makes it easier, don't you, Mr. Broome?

Mr. Broome: Well—

Mr. Witt: I don't care. I have no strong feeling about it.

Mr. Broome: I would think you would want the Judge to make the cautionary instruction in connection with this reading.

Mr. Witt: That's a good point. That being the case, I think the Court should play the Court on the first trial as shown by the transcript.

The Court: All right, I will participate to that extent.

(Counsel returned to their places in the courtroom and the following further proceedings were had within the hearing and presence of the Jury.)

Mr. Broome: May it please the Court, we have reached a point in this proceeding that we would like to present the testimony of Mr. William Mason.

[fol. 280] The Court: All right. You may take the chair.

Ladies and gentlemen of the jury, at this point there is going to be presented to you the testimony of one William Mason. Mr. Mason testified at a previous trial. He has since died and the Court has granted the Government's motion or request to permit his testimony to be presented to you from the official court records of the previous trial. It will be therefore presented to you in the same form that a deposition would be presented to you, that is, the questions and answers, the questions which were propounded to Mr. Mason previously and the answers given by him will be read into the record as well as the objections which were made and the Court's rulings on objections and also any cautionary instructions that the Court may have given at the time.

In permitting this evidence to be presented at this trial, I instruct you that it should not be given any greater weight merely because of the fact that Mason is deceased. This testimony is entitled to the same consideration, and insofar as possible, it is to be judged as to credibility and weighted by you, members of the jury, in the same way as if the witness were present in court and testified orally.

All right, Mr. Broome.

(The testimony of WILLIAM MASON and thereupon read, with Mr. Broome reading the questions and Mr. MacDonald reading the answers as follows:)

"Q. Will you state your name, please, sir?
"A. Bill Mason.
"Q. Where do you live, Mr. Mason?
"A. Butte, Montana.
"Q. What is your present occupation?
"A. I operate a retail liquor distributing establishment.
"Q. Are you married, Mr. Mason?
"A. Yes.
"Q. Have children?
"A. Yes.
"Q. Where were you born, please, sir?
"A. I was born in Europe, in Bribir. It is a part—one of the nationalities in the Yugoslovs.
"Q. When did you come to the United States?
[fol. 281] "A. 1922.
"Q. Are you a naturalized citizen?
"A. Yes.
"Q. How long have you lived In Butte?
"A. Since 1922.
"Q. What was your earliest occupation in Butte?
"A. Miner in the copper mines.
"Q. At what age did you go into the mines?
"A. I started at an early age, not quite 15.
"Q. Were you ever a member of the International Union of Mine, Mill and Smelter Workers?
"A. Yes.
"Q. When did you first become a member of that Union?
"A. I believe it was in 1933.
"Q. Will you tell us what Local that is?
"A. It's Local I of the International Union, namely, Butte Miners Union.
"Q. Did you ever hold an office in that Local?
"A. Yes, I did.
"Q. That is what office, please?
"A. Among the offices I held were those of Financial Secretary and President.

"Q. All right. Did you ever hold an office in the International Union of Mine, Mill and Smelter Workers?

"A. Yes.

"Q. And what office was that?

"A. It was the office of Board Member for District #1, Member of the International Union's Executive Board.

"Q. Will you tell us what District #1 comprises?

"A. Geographically speaking, it embraces Montana and Wyoming, Colorado, North Dakota, South Dakota, and Provinces of Alberta and Saskatchewan.

"Q. In Canada?

"A. In Canada.

"Q. When did you first become a Board Member in the International Union of Mine, Mill and Smelter Workers?

"A. 1941.

"Q. How long did you serve on that occasion?

"A. I served in 1941 and 1942.

"Q. And did you later on hold any office in the International?

"A. Yes, the same office from 1945 to 1953, inclusive.

"Q. Are you familiar with the organization and structure of the Union during the period of time, of course, that you were a member of the International Executive Board? [fol. 282] "A. Yes.

"Q. Will you describe for us, please, sir, briefly just what the organization of the Union consists of?

"A. Well, the Union consists of affiliated Local Unions in the United States and Canada. Geographically it is divided into districts with an Executive Board Member in charge of each district. The Executive Board of the Union consists of President, Vice-President, Secretary-Treasurer, and one Board Member for each district.

"Mr. Witt: If the Court please, this may be becoming a bit confusing because both Counsel and the Witness have been using the present tense even though the Witness has said that he wasn't in the Union after 1953. There is no issue about it, if the Court please, but just for clarity. The past tense should be used or there should be an under-

standing that the Witness is talking about the time he was in the Union."

Mr. Broome: If the Court please—

(Conference at the Bench out of the hearing of the Jury:)

Mr. Taylor: It just occurred to me there may be some testimony by Mason about one of the four acquitted defendants at the previous trial, and I would suppose that anything pertaining to them should not be read.

Mr. Broome: I went over this for one of those purposes, to eliminate it, and I marked such things.

Mr. Taylor: I read ahead and I saw there is mention of Powers and Marcotti coming up.

The Court: I see a reference to Powers on the next page I have before me. Do you have that marked?

Mr. Broome: Yes, I do. I had all the stuff marked I expected to excise such as this.

Mr. Taylor: We just wanted to be sure.

Mr. MacDonald: Is there any mention in the answers, because my copy is not marked, as I understand.

[fol. 283] The Court: No, your copy is not marked.

Mr. Taylor: Don't answer any questions you are not asked.

Mr. MacDonald: I read all answers as is, even though they might mention Powers and Marcotti?

The Court: No, you are going to have to skip some areas. I don't know how you are going to communicate.

Mr. Taylor: You will have to pause and go over and show him.

(Proceedings resumed within the hearing of the Jury.)

"Mr. Broome: If the Court please, I believe that I confined the questions to the period of time during which he was International Executive Board Member.

"The Court: I think there probably is, but the Witness does appear to be speaking in the present tense.

"Q. Mr. Mason, when you described the organization of the Union, you mean by that that was the organization at

the time you were a member of the International Executive Board?

"A. Yes.

"Q. All right. Do you recall where the headquarters of this Union has been in times past?

"A. Yes, mostly in Denver. Also in Chicago for several years.

"Q. Do you recall what period of time the headquarters were in Chicago?

"A. I'm not too familiar at the moment what years, but during my first service as an International officer the headquarters were in Denver. They were then moved to Chicago and moved back to Denver I believe in 1950.

"Q. Mr. Mason, do you know the defendant in this case, M. E. Travis?

"A. Yes, I do.

"Q. Do you see him in the courtroom?

"A. Yes.

"Q. Will you point him out, please?

[fol. 284] "Mr. Witt: We will stipulate that the witness is able to point out the defendant Travis.

"The Court: All right.

"Q. Do you know if M. E. Travis has held any positions in the Union?

"A. Yes.

"Q. What positions, please, sir?

"A. Well, I believe the first position was Acting Board Member for one of the districts of the Union. Later, Assistant to the President, later Vice-president of the Union, and finally Secretary-Treasurer of the Union.

"Q. All right, sir. Do you recall approximately the times that Mr. Travis held these offices? Give them to us the best you can recall.

"A. He was Secetary-Treasurer of the Union when I left the Union.

"Q. And when did you leave the Union?

"A. In 1953.

"Q. Do you know how long Mr. Travis had held the position as Secretary-Treasurer?

"A. Oh, for several years, I don't recall."

Mr. Broome: Mr. MacDonald, will you go to the next page, the question about the middle of the page?

"Q. Do you know the defendant in this case, Charles H. Wilson?

"A. Yes, I do.

"Q. Do you see him in the courtroom?

"A. Yes.

"Q. Would you point him out, please?

"Mr. Witt: We will stipulate that the Witness would be able to point out the defendant Charles H. Wilson.

"Mr. Broome: That is satisfactory.

"The Court: All right.

"Q. Now, Mr. Mason, do you know whether or not Mr. Charles H. Wilson has held any positions in the International Union of Mine, Mill and Smelter Workers?

[fol. 285] "A. Yes.

"Q. Will you tell us what positions he has held, and as nearly as you can recall it, the period of time that he held it.

"A. First position was that of International Representative. Later Executive Board Member for District 5 of the Union, and later so-called Eastern Vice-President.

"Q. Mr. Mason, will you keep your voice up. I doubt—

"A. I'm sorry.

"Q. If all the members of the Jury can hear you. Do you know the defendant in this case, Jesse Van Camp?

"A. Yes.

"Q. Do you see him in the courtroom?

"A. Yes.

"Q. Would you point him out, please?

"Mr. Witt: We will stipulate that the witness would be able to point out the defendant Jesse Van Camp.

"Mr. Broome: That is satisfactory.

"That Court: All right.

"Q. Do you know whether Jesse Van Camp held any position in the Union or not?

"A. Yes.

"Q. Do you remember what it was and the time that he held such an office?

"A. At first International Representative. Later Executive Board Member in charge of District No. 3 of the Union.

"Q. Do you recall what time it was that he held this position as Board Member for District 3?

"A. Right at the moment I can't recall the date.

"Q. All right. Now do you know the defendant in this case, Raymond Dennis?

"A. Yes.

"Q. Do you see him in the courtroom?

"A. Yes.

"Q. Will you point him out?

"Mr. Witt: We will stipulate that the witness would be able to point out the defendant Raymond Dennis.

"Mr. Broome: That's satisfactory.

[fol. 286] "Q. Do you know whether or not Raymond Dennis has held any position in the International Union of Mine, Mill and Smelter Workers?

"A. Yes.

"Q. Will you tell us, please, sir, what the position or positions were?

"A. First International Representative, later Executive Board Member in charge of District No. 3.

"Q. Is that the same district that Mr. Van Camp was Board Member of?

"A. Yes.

"Q. Now do you recall whether Mr. Van Camp's tenure as Board Member was before that of Mr. Dennis, or vice versa?

"A. Before.

"Q. Do you know the defendant in this case, Irving Dichter?

"A. Yes.

"Q. Do you see him in the courtroom?
"A. Yes.
"Q. Will you please point him out?

"Mr. Witt: We will stipulate that the witness would be able to identify and point out the defendant Irving Dichter.
"Mr. Broome: That's satisfactory, Your Honor.
"The Court: All right.

"Q. Do you know what positions, if any, that he held in the International Union of Mine, Mill and Smelter Workers during the time that you were Board Member for District 1?
"A. Position of International Representative.
"Q. Do you know the defendant in this case, Harold Sanderson?
"A. Yes.
"Q. Do you see him in the courtroom?
"A. Yes, I do.
"Q. Will you please point him out?

"Mr. Witt: We will stipulate that the witness would be able to point out the defendant, Harold Sanderson.
"Mr. Broome: That's satisfactory.
"The Court: All right.

[fol. 287] "Q. Do you know whether or not Mr. Sanderson has held a position or positions in the International Union of Mine, Mill and Smelter Workers during the time that you were a Board Member for District 1?
"A. Yes.
"Q. Will you tell us what positions, please?
"A. He was a member of the Office Staff of the International Union, most of the time acting as the assistant to the President.
"Q. Do you know the defendant in this case, Albert Skinner?
"A. Yes.
"Q. Do you see him in the courtroom?
"A. No.

"Q. You don't see Mr. Skinner in the courtroom?

"A. Oh, I'm sorry, I misunderstood you.

"Q. Well, what is your answer to the question? I asked you do you see him in the courtroom.

"A. I thought you were asking about Mr. Pezzati.

"Q. No.

"A. I made a mistake.

"Q. All right, what is your answer, do you see Mr. Skinner in the courtroom?

"A. Yes.

"Q. Will you point him out, please?

"Mr. Witt: We will stipulate that the witness would be able to point out the defendant Albert Skinner.

"The Court: Is that satisfactory?

"Mr. Broome: Yes.

"The Court: All right.

"Q. During the time that you were Executive Board Member for District No. 1, do you know whether or not Mr. Skinner held any position in the Union?

"A. Yes.

"Q. And what was it, please?

"A. International Representative."

Mr. Broome: Now we go to the next page, just above the middle of the page.

[fol. 288] "Q. All right, sir. Now, Mr. Mason, do you know a man by the name of Kenneth Eckert?

"A. Pardon, sir?

"Q. Do you know a man by the name of Kenneth Eckert?

"A. Yes.

"Q. At any time during the period that you were Board Member for District No. 1, did Mr. Eckert hold any position in the Union?

"A. Yes.

"Q. Do you recall what it was?

"A. He was Executive Board Member for the Die Casting Division of the Union.

"Q. And do you know when he held that position?

"A. Oh, for some time prior to 1948.

"Q. Were you in attendance, Mr. Mason, at a Board Meeting of the International Executive Board during the month of April, 1948?

"A. Yes.

"Q. Do you recall where that meeting was held?

"A. It was held in Chicago.

"Q. Do you remember any particular matter that was brought up at that meeting?

"A. Yes.

"Q. And what was it?

"A. There was some differences of opinion as to whether the Union should place itself in compliance with the Taft-Hartley Law.

"Q. Do you recall what those differences of opinion were?

"Mr. Witt: Object to that. It leaves the door wide open for the witness to say most anything. The question should be more specific.

"The Court: The objection will be overruled, you may answer, Mr. Mason.

"A. The majority of the Executive Board favored non-compliance. Mr. Eckert and others on the Executive Board held the opposite view.

"Q. Well, if you know, state what their view was.

"A. Well, Mr. Eckert advocated a compliance with the Taft-Hartley Law.

"Q. Now, while that—

"Mr. Witt: Before he goes to something else, may we ask that the witness identify, if he can and if he recalls, who the others were there in addition to Mr. Eckert?

[fol. 289] "The Court: I think that's a proper question.

"Q. All right, do you recall any of the others of the Executive Board that took the same position that Mr. Eckert took?

"A. Well, Mr. Madill also took the same position. I'm not quite certain as to whether he was present at that meeting or not.

"Q. Will you tell us who Mr. Madill was at the time, or what position he held in the Union, if any?

"A. Mr. Madill, I believe, was Western Vice-President at the time.

"Q. All right, sir. Now, while that meeting was in progress did you have a conversation with Maurice Travis?

"A. Yes, I did.

"Q. Do you recall where that conversation took place?

"A. Well, it was in Chicago. I don't recall the scene of the meeting, conference room.

"Q. Who was present at this conversation?

"A. I believe just Mr. Travis and myself.

"Q. Now, will you state as nearly as you can recall what the conversation was, that is, what you said to Mr. Travis and what Mr. Travis said to you.

"A. Well, I told Travis that I didn't like to see a split in the Union over the issue of compliance with the Taft-Hartley Law, and that I think something should be done to maintain unity, and suggested that I talk to Eckert and make an effort to get Eckert to withdraw his—from his position, which was in opposition to the rest of the Board on this question.

"Q. Keep your voice up, Mr. Mason, please.

"A. Mr. Travis thought—

"Q. Tell us what Mr. Travis said, not what he thought.

"A. Mr. Travis said that he thought that nothing can be accomplished by me talking to Eckert, but however if I want to, I should go and talk to Eckert, but that this decision has been made and—this decision has been made in the Party and that Eckert's in opposition to it and that as far as he's concerned, Eckert's out on this whole deal.

"Mr. Witt: May I have the last part of that answer read back, if the Court please?

"(Record read: ". . . but that this decision has been made and—this decision has been made in the Party and

that Eckert's in opposition to it and that as far as he's concerned, Eckert's out on this whole deal.")

[fol. 290] "Q. Did he say what Party?

"A. I don't believe so. I understood it to mean that—

"Mr. Witt: I object to that and move that the last part of the witness's answer be stricken and the Jury be instructed to disregard it.

"The Court: The objection is sustained and the last part of the witness's answer is stricken from the record. The Jury are instructed to disregard it.

"Q. Mr. Mason, was any decision reached at that meeting by the International Executive Board?

"Mr. Witt: Since counsel has gone to another subject, may we ask for the cautionary instruction?"

The Court: (reading) "Ladies and gentlemen of the jury, you are specifically instructed that in any testimony from this witness concerning an alleged conversation between the witness and the defendant, Maurice Travis, can be considered by you in connection with the case of the United States against M. E. Travis only, and cannot be considered by you in any manner or to any degree against any of the other defendants.

"Mr. Broome: I believe there is a question pending.

"(Question read.)

"A. Yes.

"Q. And what was the decision, please?

"A. The decision, as I recall, was not to comply with the Taft-Hartley Law.

"Q. Now, Mr. Mason, were you in attendance at a meeting in Denver in 1948, sometime after this Board Meeting in Chicago?

"A. Yes.

"Q. Do you remember approximately what time the meeting in Denver was?

"A. I can't recall the date of the meeting, no.

"Q. Can you recall how long it may have been after this Board Meeting in April that you have just testified about?

"A. Not too long after the meeting of the Board in Chicago. Perhaps a matter of weeks.

"Q. Do you recall what kind of a meeting that was?

[fol. 291] "A. As I recall, it was a so-called Mine, Smelter and Refinery Conference.

"Q. How large a meeting was it?

"A. It was a good sized body. It was the biggest of the Wage Policy Conferences within the Union.

"Q. Do you recall any matter that was brought up and discussed at that meeting?

"A. Well, this same question of noncompliance with the Taft-Hartley Law.

"Q. Will you state some of the persons who were present at that meeting, if you please?

"A. Well, I believe the entire leadership of the Union was present.

"Q. Tell us what you mean by the entire leadership of the Union.

"A. President and Vice-President, Secretary-Treasurer, and most of the Executive Board Members. There were delegates of Mine, Smelter and Refinery locals throughout the jurisdiction of the Union.

"Q. Do you recall any of the persons who discussed this question of compliance at that meeting?

"A. Well, almost—almost all of the officers of the Union had something to say on this question. I can't recall any specific speeches made on the question.

"Q. Was there a controversy over the question there?

"A. Yes, there was a sharp bite over the question. Some of the people present dissenting from the recommendation which was to not comply.

"Q. Who were the persons that were dissenting?

"A. Well, Eckert and Madill. Two.

"Q. Was any decision reached in that meeting?

"A. I believe a resolution or statement was adopted approving the position of noncompliance.

"Q. All right, sir. Now, Mr. Mason—

"Mr. Witt: If counsel is going to another subject, may we ask for cautionary instruction with respect to the meeting in Denver, if the Court please?

"The Court: There is no specific conversations related. He just told the result of the meeting, and a resolution or statement was adopted.

[fol. 292] "Mr. Witt: Then we move to strike all the witness's testimony about that meeting in Denver, because all of that testimony is irrelevant to the issues of this case and none of it would be evidence against any defendant on trial.

"The Court: Well, I don't think he has stated any defendant on trial being present at this meeting. The motion will be granted, the testimony of the witness concerning the so-called Denver meeting to which he has just testified will be stricken from the record. The Jury are instructed to disregard it.

"Mr. Witt: May the Court please, we were watching where this was going, and it seems to us we have the same problem with respect to the April, 1948, meeting in Chicago. We asked for the cautionary instruction with respect to the witness's conversation with Travis, and then we checked our notes, and it seems to us that the defect in the witness's testimony about the Denver meeting also applies to the witness's testimony about the Chicago meeting in April.

"The Court: The motion with reference to the Chicago meeting will be denied.

"Q. Mr. Mason—

"Mr. Witt: Then, if that is so, Your Honor, we will have to ask for the cautionary instruction with reference to the April meeting in Chicago.

"The Court: I gave it.

"Mr. Witt: Well, you gave it with respect to the conversation between the witness and Travis, but we don't believe you gave it with respect to the Board Meeting.

"The Court: Well, there was no quoted conversation that I recall, except that of Mr. Travis, with this witness, and any other defendant in Chicago. Motion will be denied.

"Q. Mr. Mason, by virtue of your position as Board Member for District No. 1, can you tell us what the conditions were in the Union during the year 1948 and 1949?

[fol. 293] "Mr. Witt: Object to that as to the form on the similar ground I stated earlier. The question is so general, it's hard to direct the witness's attention to any particular aspect of that.

"The Court: The objection is sustained. The question is too general.

"Q. Well, I'll try to put it this way. By virtue of your position as a member of the International Executive Board, were you familiar with conditions in the Union in the year 1948 and 1949 with respect to any agitation on this question of compliance with the Taft-Hartley Act and the result it had on the Union?

"A. Yes.

"Q. Now will you state what those conditions were?

"A. Well, a considerable section of the membership were in favor of the Union complying with the Taft-Hartley Law. Some of the persons in the leadership of the Union likewise took the position that it's time for the Union to comply. The Union was having a difficult time organizing and holding onto some of the local unions that—membership for which was being organized by other unions. There was considerable feeling among the members and within the leadership itself, the leadership of the Union, in favor of changing the policy of the Union with respect to the Taft-Hartley Law.

"Q. Were there any losses of membership and of locals during this period, resulting from the agitation on the question of compliance?

"A. Yes, there was some—some losses of membership.

"Q. Do you remember where those losses were?

"A. Well, one situation that I recall was the locals down in Alabama, locals of Iron Ore Miners. I am not too familiar with that area of the Union, but there was several locals lost there.

"Q. Is that as much as you can recall about it?

"A. As much as I can recall at this time.

"Q. Yes. All right. Now, Mr. Mason, did you have occasion to attend a meeting of the International Executive Board during the summer of 1949?

"A. Yes.

"Q. Do you recall where that meeting was, please?

"A. The meeting I have in mind took place in Chicago.

"Q. Can you tell me with more definiteness when that meeting took place?

"A. It would be in the midst of the summer. As I recall, in July.

[fol. 294] "Mr. Broome: May this document be marked as Government's Exhibit, I believe it would be 11.

"(Government's Exhibit No. 11 was marked for identification.)

"Q. Mr. Mason, I hand you a document that has been marked for identification Government's Exhibit 11 and ask you to examine it.

"(Witness examines document.)

"Q. And state if that relates to the meeting that you just testified about.

"A. Yes, it does.

"Mr. Taylor: May we see it just a minute, Mr. Broome? Thanks.

"Q. Now, Mr. Mason, prior to the time that this meeting of the International Executive Board was held, did you have a conversation with Maurice Travis?

"A. Yes.

"Q. Do you recall where that conversation was?

"A. It was in Chicago.

"Q. Do you remember when it was with respect to this meeting of the International Executive Board?

"A. I can't recall the date but it was, as I recall now, at least a month before this meeting of the Executive Board.

"Q. All right, sir. Now, where was this meeting or this conversation with Travis held?

"A. Out to the residence of Mr. Travis in Chicago.

"Q. And who was present at the conversation?

"A. Mrs. Travis was there, also. The only others were Mr. Travis and myself.

"Q. Was Mrs. Travis present at the conversation itself?

"A. No, she didn't participate in the conversation.

"Q. Now, will you tell us, please, sir, as nearly as you can recall, just what this conversation was, that is, what you said to Mr. Travis and what Mr. Travis said to you?

"A. Travis said that quite a number of the people out in the field were in favor of the Union changing its position on the Taft Hartley law, that difficulties of organizing and retaining, even retaining our membership as a union that is not complying with the Taft-Hartley Law and therefore unable to use the machinery provided by the National Labor Relations Board, these difficulties were increasing and that [fol. 295] there was discussion going on within the Party concerning the change in this position and he said to me, 'You'll be very happy to learn that the boys in the Party are considering changing our position on this and you'll be hearing about it pretty soon."

Mr. Broome: At that point, if the Court please, we offered in evidence Government's Exhibit No. 11. At this point I would like to offer that particular exhibit.

(Government's Exhibit No. 6 was marked for identification.)

Mr. Broome: If the Court please, at this time the Government offers in evidence Government Exhibit No. 6.

Mr. Witt: Would you give us a moment?

The Court: Yes.

At the Bench

Mr. Taylor: We are not quite clear how to handle the matter of exhibits. I don't know whether the exhibit is going in as part of the deceased's testimony or sort of independently. Is the defense entitled to make any objection we didn't make before, or do we say exactly what we said before about the exhibit?

The Court: Well, I think you can make any objection you have.

Mr. Taylor: To the exhibit?

The Court: To the exhibit, yes.

Mr. Taylor: In the sense it is being identified by the witness but any objection we might have on relevance or anything like that we can make now?

The Court: That's right. I don't believe the defense could question the authenticity before but they could its relevancy and competency to preserve the record.

Mr. Taylor: All right.

[fol. 296] In Open Court

Mr. Taylor: On the exhibit offered, Your Honor, no objection on authenticity, the same objection on relevance.

The Court: The exhibit which has been marked 6 was previously marked 11, is that right?

Mr. Broome: That's right, previously marked 11; we have now marked it 6.

The Court: The exhibit will be received.

(Government's Exhibit No. 6 for identification was received in evidence.)

(Reading of testimony of William Mason continued as follows:)

"The Court: Is that the extent of your testimony concerning this meeting at the Travis home?

"Q. Is there anything else you recall about that conversation, Mr. Mason?

"A. I can't recall much of anything else that has to do with this question of Taft-Hartley.

"Mr. Taylor: Before Your Honor gives the cautionary, which I take it you were planning to do, the defendant would like to move that that testimony be stricken on the ground it is irrelevant, as not tending to prove a conspiracy charge in the indictment.

"The Court: The motion will be denied."

The Court: (Reading) "All right. First, I will give the cautionary instruction.

"Ladies and gentlemen of the Jury, you are specifically instructed that any testimony of this witness concerning this alleged conversation between the witness and the defendant Travis may be considered by you in connection with the case of the United States of America against the defendant Travis only and cannot be considered by you in any manner or to any degree against any of the other defendants."

[fol. 297] Exhibit 6, which was Exhibit 11, will be received.

(Government's Exhibit No. 6 for identification was received in evidence.)

Mr. Broome: May it please the Court, at this time I would like to ask Mr. Maddrix to read portions of this exhibit.

Mr. Maddrix: May it please the Court. Ladies and gentlemen of the jury, I will read you portions from the minutes of the International Executive Board meeting of Mine-Mill held from July 19 to July 22, 1949.

"Afternoon Session, Tuesday, July 19, 1949.

"The meeting was called to order by President Clark at 2:20 p.m., with the following members of the Executive Board present: John Clark, President; Reid Robinson, Vice-President; Orville Larson, Vice-President; William Mason, Board Member, District #1; Jesse Van Camp, Board Member, District #3; Leonard Douglas, Board Member, District #4; Albert Pezzati, Board Member, District #6; Chase Powers, Board Member, District #7.

"The rest of the session was devoted to a discussion of the Taft-Hartley Law, participated in by all of the members of the Executive Board."

Now skipping to the morning session of Wednesday, July 20, 1949: "President Clark convened the Board meeting at 10:30 a.m. All of the members of the Board previously noted as present were in attendance. Board member of District #5, Charles Wilson, registered his attendance.

"Afternoon Session, Wednesday, July 20, 1949. The Board resumed its discussion of the Taft-Hartley Law, and after considerable discussion, President Clark read the following statement for approval by the Board:"

This is titled "Executive Board Statement on Taft-Hartley Affidavits."

[fol. 298] "The International Union of Mine, Mill and Smelter Workers has steadfastly maintained its boycott of the National Labor Relations Board for more than two years. We have waged an uncompromising struggle against the Taft-Hartley Act from the day it was conceived in the minds of corporation lawyers as a death sentence for the labor movement. Two developments in recent months, however, have seriously affected this boycott policy. They are:

"1. The shameful betrayal of labor's fight for the repeal of the Taft-Hartley Act, and as part of that betrayal.

"2. The adoption of raiding, gangsterism, and strike-breaking as official policy by reactionaries in the leadership of CIO.

"The impact of these two outrages against the American workers is so profound that the International Executive Board has met to reconsider the question of Mine-Mill's non-compliance with filing requirements of the Taft-Hartley Act. We have concluded that the kind of fight confronting our union demands a change in tactics. Accordingly the Executive Board has voted unanimously to comply with the necessary requirements to permit our union to use the processes of the National Labor Relations Board.

"The decision to sign the affidavits is not a happy one. Our boycott of the Taft-Hartley Board has been an his-

toric contribution to the fight for labor's rights. Each time our union has reaffirmed this boycott, we have do so with the warning that only an all-out, united fight on the part of All labor would be sufficient to bring about the repeal of Taft-Hartley. Had all labor heeded our warning and followed our example, Taft-Hartley would not be a law today.

"But many labor leaders chose to surrender to the boss and his political servants. Some AFL and CIO leaders helped the Truman administration shatter labor's resistance to phoney compromises that resulted finally in leaving Taft-Hartley on the books.

"The leadership of CIO ignored our emphatic warnings that 'leaving it up to Truman' would be disastrous. The rank-and-file of labor was demobilized by claims of the AFL and CIO officialdom that Truman would deliver.

"It must be recognized now that the fight to repeal Taft-Hartley has been betrayed by the 81st Congress, the Tru-[fol. 299] man administration, and the ruling cliques of both CIO and AFL. Backdoor deals and top-level maneuverings have resulted in nothing save encouragement to employers to continue their union-busting drive. The betrayal is well-documented and Mine-Mill fully intends to present the evidence at the October convention of CIO.

"Even the brazen sellout of the repeal fight, however, would not be sufficient to warrant a change in our affidavit policy were it not for the second development. We feel confident that Mine-Mill could have turned back the employer attacks against our membership and could have weathered the repeal sellout without a policy change. The decisive factor determining our decision to comply is the use of strike-breaking and raiding as an official policy of the ruling clique of CIO.

"There is every indication that raids and strikebreaking activities against Mine-Mill will continue with the full support of CIO officials. The most recent CIO executive board meeting served notice on progressive, rank-and-file unions that they must go along with the dictates and bankrupt

policies of some CIO leaders or face attacks designed to drive them from CIO. Since this union's leadership does not intend to bargain away the autonomy or rank-and-file democracy which has made this union strong, we expect that raiding will increase against our union and we must better prepare ourselves to fight.

"Two events in recent months have brought home the intensity of the fight to smash Mine-Mill. The first was the maiming and attempted murder of Secretary-Treasurer Maurice E. Travis by hoodlums on the payroll of the United Steelworkers of America. The second was the shooting of American Zinc strikers by the Verdu gang operating with the blessing of national CIO, despite official CIO policy of support for the strike. This introduction of gangsterism into the affairs of CIO serves as blunt warning that some CIO leaders, unable to sell their brand of unionism to the great rank-and-file of CIO, intend now to have it adopted by force—at the point of a gun and with brass knuckles.

"From the beginning of the Taft-Hartley fight our officers recognized that changing circumstances might later require a change in our policy relating to Taft-Hartley. Circumstances now have changed; strike-breaking, raiding and gangsterism now are encouraged and directed by top officers of CIO. Raids on our membership will be more frequent and more vicious.

[fol. 300] "We still believe that Taft-Hartley is an employer's law designed to smash the labor movement. We still believe that the Taft-Hartley affidavits are an invasion of our members' constitutional rights. We will continue the fight for repeal of Taft-Hartley with every weapon at our command, insisting as always that only the unity of all labor will bring final victory. And we emphatically reject any postponement of this important fight as indicated by national CIO.

"In signing the affidavits we want to make it very clear that we are not succumbing to the hysteria of redbaiting that has become so popular among some labor leaders. We condemn the present anti-Communist crusade as a violent

attack on democracy. We renew now our pledge to carry out the Mine-Mill constitutional provision for equality of membership, regardless of race, creed, national origin or political faith.

"We also want to make it very clear that in signing the affidavits we are not retreating one inch from those policies which we believe best serve the interests of our membership, the labor movement, and the American people. We are a progressive militant union, we have been a progressive, militant union, and we will continue to be a progressive, militant union. Our fight for the well-being of the American people and for peace, against the warmongers and the reactionaries will continue as strenuously and thoroughly in the future as it has in the past. We intend to carry the fight to the enemy on every front.

"Let no Mine-Mill member believe that our signing the Taft-Hartley affidavits will automatically win wage increases or other contract benefits for our members. As far back as our 1947 convention in St. Paul we warned that nothing would win economic or political gains for our members except rank-and-file unity and militancy. That is true today. Our union cannot depend on legal maneuvers to protect our membership.

"We ask that the forthcoming convention in Chicago uphold our decision to comply with the requirements necessary to use the NLRB. We call upon all Mine-Mill members to rally around their union in the same spirit with which they have defended it in the past. Unity in our own ranks is a prerequisite for the victory of united labor over those who would imprison the American people behind a stockade of fascism and super-profits."

[fol. 301] And, then, "Motion by Robinson, seconded by Douglas to adopt the Statement," which I have just read.

"Motion on the Taft-Hartley statement carried unanimously by all board members in attendance. President Clark read a wire—" Well, we don't need that.

"Motion by Van Camp, seconded by Powers, to authorize Brother Harold Sanderson, assistant to the President, to

handle questions raised by local unions on the matter of filing of Taft-Hartley forms. Carried."

(Reading of testimony of William Mason continued as follows:)

"Q. Mr. Mason, do you recall whether or not—

"Mr. Taylor: Excuse me, were you through with that meeting?

"Mr. Broome: No.

"Mr. Taylor: You are going on with the same meeting?

"Mr. Broome: Yes.

"Mr. Taylor: Beg your pardon.

"Q. Do you recall whether or not there was any discussion at this meeting with respect to what the policy of the Locals would be?

"A. Yes.

"Q. Do you recall who discussed that, please?

"A. I don't recall who discussed it. There was a discussion on the subject at the Board Meeting.

"Mr. Taylor: Object to further answer to that, Your Honor.

"The Court: I think the answer is complete. It may stand. You may proceed.

"Mr. Broome: I don't recall, I think there was an objection. I don't remember whether there was a ruling or not.

[fol. 302] "The Court: Yes, I ruled that the answer would stand. I said I thought the answer was complete. Do you want to hear the answer? Do you want the reporter to read it to you?

"Mr. Broome: No, he said there was discussion, as I recall it.

"Q. Was there any decision reached at this meeting with respect to what the policy of Locals would be in this matter of compliance?

"A. Yes, there was.

"Q. Do you remember what the decision was?

"A. To the best of my knowledge, the decision was to develop a situation wherein the Locals would not automatically comply and would comply only if they have to use the facilities of the National Labor Relations Board or were involved in some kind of an issue involving the services of the National Labor Relations Board. The feeling expressed was that unless some precautionary measures are taken, that the Local Unions may rush in and comply with the Taft-Hartley Law and that was, according to the people on the Board, not the desired thing. In other words, the policy, as far as the Local Unions are concerned, is that they should apply only if they have to explore some use of the National Labor Relations Board.

"Mr. Broome: May this document be marked as Government's Exhibit No. 12?

"Q. Mr. Mason, I hand you a document that has been marked for identification Government's Exhibit 12. I ask you to examine that and state whether or not you can identify it.

"A. Yes, I can.

"Q. What is it?

"A. It's a circular letter from the International Union to the Local Unions, informing the Local Unions that the International Executive Board has adopted the position of complying with the Taft-Hartley Law. It is a covering letter enclosing the statement of the Board on change in position of the Union. Also, some reference in the letter to Local Unions concerning the steps they should take if they have to comply.

"Mr. Taylor: May the Court please, it seems clear to me Mr. Broome is now going to another matter. Could I therefore ask the Court to caution the Jury with respect to the meeting of July 19th, that the acts or declarations may be considered only with respect to those defendants present and with respect to those present only insofar as they assented to the declarations or actions.

[fol. 303] The Court: (reading) "Ladies and gentlemen of the jury, with particular reference to the meeting of the Board in July of 1949, in Chicago, as to which this witness has given some testimony, and specifically to the minutes of the meeting which were read as being a part of Exhibit 11, Government's Exhibit 11, you are instructed that any testimony from this witness concerning this meeting and any statements or actions taken by any of the defendants at the meeting can be considered by you in connection with the case of those defendants only, that is, the Government against those defendants only and cannot be considered by you in connection with or in any manner or to any degree against any of the defendants who were not present at a meeting or who did not otherwise assent as shown from the evidence by what took place at the meeting.

Mr. Broome: (reading) "We offer in evidence Government's Exhibit 12.

"Mr. Witt: No objection.

"The Court: Exhibit 12 will be received.

("Government's Exhibit 12, for identification, was received in evidence.)

Mr. Broome: May it please the Court, we offer in evidence Government's Exhibit No. 7, which is the same as is referred to in the transcript we are reading from as Government's Exhibit No. 12.

(Government's Exhibit 7 was shown to counsel.)

Mr. Taylor: No objection, Your Honor.

The Court: It will be received. It is received.

(Government's Exhibit No. 7 for identification was received.)

Mr. Broome: If the Court please, at this time I would ask that Mr. Maddrix be permitted to read Government's Exhibit No. 7.

The Court: All right, you may.

[fol. 304] Mr. Maddrix: May it please the Court, ladies and gentlemen of the jury, I am reading Exhibit 7, which

is a letter on the letterhead of International Union of Mine, Mill and Smelter Workers. It is dated July 21, 1949, and it is addressed to all Local Unions and reads as follows:

"Dear Sirs and Brothers: Enclosed herewith is a copy of the statement adopted unanimously by the International Executive Board on July 20, which sets forth the decision of the Executive Board to comply with the filing requirements of the Taft-Hartley Act and the reasons therefor.

"One basic factor in this decision to comply with Taft-Hartley should be clearly understood by the membership. The decision does not mean that the Executive Board has suddenly come to the conclusion that Taft-Hartley is a good thing. Experience during the two years since Taft-Hartley was passed has convinced us of our original estimate that the use of the National Labor Relations Board is a trap. It should be clearly understood, therefore, that local unions should not use the Board and comply with the filing requirements except where such action is absolutely essential to the life or protection of the Union. No one should think that this new policy means we believe that the Board should be used as freely as before Taft-Hartley.

"Therefore, and in view of the serious factors involved in compliance and in use of the National Labor Relations Board, the Executive Board has reaffirmed its policy of requiring local unions to clear with the National Office before the N.L.R.B. is used and before compliance is effected by a local union. The mere fact that the International Union is complying does not mean that the local unions have to comply. Where a local union believes that compliance is necessary to meet a particular problem, consultation with the National Office may make it possible to solve the problem without compliance, and will also enable the National Office to assist unions in complying if compliance is deemed to be the only alternative.

"All such problems should be referred to Harold Sanderson in the National Office. He will refer all questions of policy to the National Officers for determination and

consultation. Wherever compliance is to be effected, Brother Sanderson will also advise the local unions as to the procedures to be followed and will also have the necessary forms to be used.

[fol. 305] "All locals should carefully study the enclosed statement and give it the widest publicity in local and area papers. Sincerely and fraternally, International Executive Board, John Clark, President."

The Court: I believe we will take a recess at this point. Ladies and gentlemen of the Jury, we will be in recess for ten minutes.

(The Court recessed 10:42 o'clock a.m. and reconvened at 10:55 o'clock a.m.)

At The Bench

Mr. Witt: If the Court please, for the sake of expedition, and to help the other side in planning and the Court, of course, we want to say something now about what we have in mind as to the 3500 voir dire on Gardner. Your Honor will recall that the only agent that we have requested in connection with Gardner is Zoeller, and that remains the same.

Your Honor will also recall that we stated generally that we wanted the attorneys, all the attorneys, in connection with Gardner.

We want to state now that we will waive the appearance of the following persons, who, according to Gardner's testimony on the first trial, talked to him about the subject matter at one time or another. We waive the appearance of Messrs. Greenhalgh, Schoepke, Harris, Canary, a member of the U.S. Attorney in Cleveland in the West case. Mr. Crandall, who was here yesterday. Mr. Vincent, who was on the second Travis trial with Mr. Crandall. That does it. That will leave us Mr. Broome, Mr. Heflin, who was with Mr. Broome in connection with Gardner's appearance before the 1956 Grand Jury, and Mr. Kelley, who handled Gardner on the witness stand in the second Travis trial. Have I made myself clear?

The Court: Yes.

In Open Court:

The Court: Mr. Broome, are you ready to proceed?

Mr. Broome: May it please the Court?

[fol. 306] The Court: Mr. Broome.

Mr. Broome: (reading)

"Q. Now, Mr. Mason, following the meeting of the International Executive Board in Chicago concerning which you have just testified, did you have a conversation with Maurice Travis?

"A. Yes.

"Q. Do you recall where that conversation took place?

"A. The conversation I have in mind took place in Denver.

"Q. Do you remember about how long it was after this meeting of the International Executive Board that this conversation took place?

"A. As I recall, it was only a matter of a week or so after the meeting of the Executive Board in which decision was made to comply with the Taft-Hartley Law.

"Q. Mr. Mason, I wish you would keep your voice up.

"A. I'm sorry.

"Q. I sometimes have a little difficulty hearing you here.

"A. I have a cold.

"Q. Now who was present at this conversation?

"A. As I recall, only Mr. Travis and myself. There were others about, but the discussion was between Mr. Travis and myself.

"Mr. Taylor: Move to strike the rest of that, Your Honor.

"The Court: Motion denied.

"Q. Now will you please state as nearly as you can recall what the conversation was, that is, what you said to Travis and what Mr. Travis said to you?

"A. I asked Mr. Travis how the change in the position of the Union with respect to the Taft-Hartley Law would affect him personally. Would it mean that he would now

have to resign as Secretary-Treasurer of the Union? He said that it does not mean that he would have to resign as Secretary-Treasurer of the Union, but that he will now have to resign from the Party. He showed me a statement that he said had been prepared and that this statement was cleared with Ben Gold and the Party people in New York and that this statement is a resignation from the Communist Party and that he would like to have me look it over, get my reaction to it, particularly as to how the membership in the Montana locals will take this statement, because it is to be published in the International Union paper. I looked his statement over briefly and told him that I thought that under the circumstances it was the only thing he could do.

[fol. 307] "Q. Did you subsequently see a statement published in the Union paper—

"Mr. Taylor: Are you leaving that conference, Mr. Broome?

"Mr. Broome: Yes.

"Mr. Taylor: Your Honor, we would move to strike the testimony on the ground that it does not tend to prove the conspiracy charge.

"The Court: Motion will be denied.

"Mr. Taylor: We would then ask that Your Honor give the cautionary instruction that the evidence be considered only with respect to the defendant Travis."

The Court: (Reading) "Ladies and gentlemen of the Jury, you are specifically instructed that the testimony of this witness concerning this alleged conversation in Denver with the defendant Travis can be considered by you in connection with the case of the United States of America against M.E., or Maurice E. Travis only, and cannot be considered by you in any manner or to any degree against any of the other defendants. All right, Mr. Broome."

"Mr. Broome: I believe that I had propounded a question.

"The Court: Yes. You may read it."

"Q. Did you subsequently see a statement published in the Union paper?

"A. Yes.

"Mr. Broome: May this document be marked as Government's Exhibit No. 13?

"(Government's Exhibit No. 13 was marked for identification.)

"Q. I asked you, Mr. Mason, to take a look at Government's Exhibit No. 13 and state whether or not you can identify it.

"A. Yes, I can.

"Q. What is it?

"A. It's page 3 of the official organ or the Union containing full text of the Travis statement on resigning from the Communist Party.

[fol. 308] "Mr. Broome: Thank you. We offer in evidence Government's Exhibit No. 13.

"Mr. Witt: No objection.

"The Court: Thirteen will be received."

Mr. Broome: If the Court please, we would like to have this document marked for identification as Government's Exhibit 8.

(Government's Exhibit No. 8 was marked for identification.)

Mr. Broome: May it please the Court, we offer in evidence Government's Exhibit No. 8, which is the same as Government's Exhibit No. 13 which appears in the transcript we have just read from.

Mr. Taylor: No objection.

The Court: It will be received.

(Government's Exhibit No. 8 for identification was received in evidence.)

(Reading of testimony of William Mason continued as follows:)

"Mr. Broome: I would like to call counsel's attention to the little bracket in the middle of the page. I would like to include that in the offer.

"Mr. Witt: No objection.

"The Court: May be received.

Mr Broome: May it please the Court, we would like to read this exhibit to the Jury.

"The Court: All right."

Mr. Broome: Now, if the Court please, I would like to ask Mr. Maddrix to read Government's Exhibit No. 8 to the Jury.

The Court: You may.

[fol. 309] Mr. Maddrix: If it please the Court, ladies and gentlemen of the Jury, this is a statement appearing in "The Union," which was the official paper of Mine-Mill, dated August 15, 1949, to be found on page 3, and the title is as follows: "Travis Statement on Signing Taft-Hartley Law Affidavit," by Maurice Travis, International Secretary-Treasurer.

"The Executive Board of our International Union has voted to comply with the Taft-Hartley Law. I support this decision.

"As most of the membership knows, I have stated, more than once in the last two years, that if it became important to the life of our union to comply with Taft-Hartley, I would support such a step. The reasons which have now made it vital to our Union to comply are the betrayal of labor's fight for repeal of the Taft-Hartley Act by the controlling leadership of both the CIO and the AFL, by the 81st Congress and the Truman Administration—a betrayal which now saddles the labor movement with this law for another two years—and as part of that betrayal, the adoption of raiding, gangsterism and strikebreaking as official policy by reactionaries in the leadership of CIO.

"Since the Executive Board meeting at which compliance was voted, I have deliberated very carefully on my course and I have also had the benefit of thorough discussions with my fellow officers, Executive Board members, and members of the Staff. The unanimous opinion of my fellow officers and the others in the International Union is that the most effective way in which I can serve the International Union is by continuing in my post as an officer of the International Union.

"Since the interest of the International Union is uppermost in my mind, I have been confronted with the problem

of resigning from the Communist Party, of which I have been a member, in order to make it possible for me to sign the Taft-Hartley affidavit. I have decided, with the utmost reluctance and with a great sense of indignation, to take such a step. My resignation has now taken place and, as a result, I have signed the affidavit.

"This has not been an easy step for me to take. Membership in the Communist Party has always meant to me, as a member and officer of the International Union, that I could be a better trade unionist; it has meant to me a call to greater effort in behalf of the union as a solemn pledge to my fellow members that I would fight for their interests above all other interests.

[fol. 310] "The very premise of the Taft Hartley affidavits is a big lie, the same sort of lie that misled the peoples of Germany, Italy and Japan down the road to fascism. It is a big lie to say that a Communist trade unionist owes any higher loyalty than to his union. On the contrary, trade unions are an integral part of a Socialist society, the kind of society in which Communists believe. Therefore, I believe that good Communists are good trade unionists.

"The biggest lie of all is to say that the Communist Party teaches or advocates the overthrow of the government by force and violence. If I had believed this to be so I would not have joined the Communist Party. If I had later found it to be so I would never have remained in it. All the slanders by the corrupt press, all the FBI stool pigeons, and all the persecution of Communist workers will not make me believe it is so. I believe that when the majority of the American people see clearly how rotten the foundation of the capitalist system is, they will insist on their right to change it through democratic processes, and all of the reactionary force and violence in the world will be unable to stop them.

"It is because I believe these things that I have fought the affidavit requirement of Taft-Hartley. I believe it is a blot on American life; I believe under our Bill of Rights, for which our forefathers fought, that an American has as much right to be a Communist as he has to be a Republican, a Democrat, a Jew, a Catholic, or any Elk or a Mason.

Free voluntary association is the very cornerstone of the democratic way of life. I have been a Communist because I want what all decent Americans want, a higher standard of living for all the people, the ending of discrimination against Negroes, Mexican-Americans, and all other minority groups. I want a peaceful America in a peaceful world. Despite my resignation from the Communist Party, I will continue to fight for these goals with all the energy and sincerity at my command.

"I am also taking this step because I believe it is one effective means of bringing home, not only to the membership of the International Union but to the people generally, the dastardly and unprecedented requirement that a man yield up his political affiliations in order to make a government service available to the people he represents. This is a dangerously backward step in American political life which threatens all of our democratic institutions. Americans have the right to belong to the political party of their choice and trade union members have the right to choose their own leaders. Denial of these principles undermines [fol. 311] democracy and gives comfort to the arrogant reactionaries who seek to put our country on the road to fascism.

"At the same time, I want to make it absolutely clear that my opinion continues to be that only a fundamental change in the structure of our society, along the lines implied in the very words of the charter of our International, 'Labor produces all wealth—wealth belongs to the producer thereof,' can lead to the end of insecurity, discrimination, depressions and the danger of war.

"I am convinced the capitalistic greed is responsible for war and its attendant mass destruction and horror. I am convinced it is responsible for depression, unemployment and the mass misery they generate. The present deepening depressing, growing unemployment, and threat of war confirm my conviction that the only answer is Socialism.

"As a matter of fact, this Socialist concept has always been the guiding principle for American workers. The struggle led by the great Eugene V. Debs, the early fight for the 8-hour work day, the steel and packing struggles

led by Bill Foster, the stormy history of the I.W.W. were all influenced by Socialist ideals.

"As a member of our International Union I have always been proud of and have drawn strength from its basic Socialist tradition. No other union in this country matches ours in its glorious working-class history. Our union, and its predecessor, the Western Federation of Miners, has carried on some of the most bitter and courageous struggles in the history of the labor movement. I have always been inspired by the fact that early leaders of this union were socialistic in one form or another, that Bill Haywood also took the road to Communism and died not only as a great leader of the working class but as an honored and respected Communist.

"Therefore, I want to make it crystal clear that my belief in Communism is consistent with what I believe to be the best interests of the members of this Union and the American people generally and that I am especially happy to be able constantly to remember that it is consistent with the finest traditions of the International Union.

"I know that sooner or later we will turn this present shameful page in American life, that the reactionary offensive will be beaten back and that the American workers will again resume their march on the road to peace, progress [fol. 312] and prosperity. Particularly do I know that the day will come when loyalty oaths and affidavits will be a thing of the past, when the true test will again be service to the people and, for trade union leaders, service to their members.

"In the meantime, I am sure that every member of the International Union joins me in my pledge to fight to keep this International Union strong, to bend every effort to make it even stronger, to continue to keep it on a progressive, militant course, and to do everything in my power to make life in our country happy, secure, prosperous and peaceful."

Mr. Broome: I believe we go to the top of page 1274.
The Court: My pages aren't numbered.
Mr. Taylor: 424.
Mr. Broome: 1281.

(Reading of testimony of William Mason continued as follows:)

"Mr. Taylor: Now, Your Honor, that Mr. Stoddard has finished reading that document, we request that the Court instruct the Jury that document may be considered only in connection with the case of the defendant Travis.

"The Court: Do you concur in that?

"Mr. Broome: Yes."

The Court: (Reading) "Ladies and gentlemen of the Jury, you are specifically instructed that the matter which counsel for the Government has just read into the record from Government's Exhibit 13, purporting to be a statement made by the defendant Travis, published in the Union newspaper of August 15, 1949, can be considered by you in connection with the case of the United States of America against the defendant, M.E. Travis, only and cannot be considered by you in any manner or to any degree against —or in connection with the case of any of the other defendants in this case."

"Q. Mr. Mason, did you attend a session or a meeting of the International Executive Board in Chicago, Illinois, in the early part of 1950?

[fol. 313] "A. Yes.

"Q. Can you perhaps fix that date more closely?

"A. No, I'm sorry that I can't. There's probably been a number of meetings in that year. The one I have in mind must have been quite early in the year.

"May this document be marked as Government's Exhibit No. 14?

"(Government's Exhibit No. 14 was marked for identification.)

"The Court: I am correcting the number of the exhibit in the record. When I gave the cautionary instruction I used 12 instead of 13.

"(Mr. Taylor nods affirmatively.)

"The Court: All right, Mr. Broome.

"Q. Mr. Mason, I show you a document that is marked for identification Government's Exhibit No. 14. I ask you to examine it and state if that refreshes your recollection as to when you attended a meeting of the Executive Board in 1950.

"Mr. Taylor: May we clarify the exhibit numbers, Your Honor? The Travis statement is 13?

"The Court: Yes, the newspaper.

"Mr. Taylor: The newspaper is No. 13. That is the one you gave the cautionary instruction on?

"The Court: Yes. I related it as being 12, and I was in error; I corrected it.

"Mr. Taylor: The present one is 14.

"Mr. Witt: All right, Your Honor, since this witness has already said this meeting he started to answer about took place in early 1950, I think he said quite early in that year, there doesn't seem to be any necessity for having him look at Government's Exhibit No. 14 for identification for the purpose of refreshing his recollection as to the date.

[fol. 314] "The Court: I think that's correct.

"Mr. Broome: Your Honor, I think he is entitled to look at this exhibit and refresh his recollection on this specific date.

"The Court: Well, if you desire for him to relate the substance of what took place at this meeting and then you want to fix the date—but you see, by allowing him to see the exhibit at this time, I presume it shows what took place, too, so it isn't a proper way to examine on direct.

"Mr. Broome: Yes. All right.

"Q. Mr. Travis—pardon me, Mr. Mason, while you were in attendance at a Board meeting in Chicago in the early part of the year, did you have a conversation with Mr. Albert Skinner?

"A. Yes, I did.

"Q. And where was this conversation, please?

"A. It was in the corridor of some hotel. As I recall, after one of the sessions of the Executive Board.

"Q. Yes. Who was present at this conversation?

"A. Conversation was between Mr. Skinner and myself.

"Q. Now will you state, please, sir, what the conversation was as nearly as you can recall it. That is to say, what Mr. Skinner said to you and what you said to Mr. Skinner.

"A. Mr. Skinner said that he had been assigned to approach me on the question of joining the Communist Party. He said that this period of crisis within the Union, we ought to close our ranks, become united, and be all one family and work together, and that all of the boys, Pezzati and the rest of them, were in favor of asking me to join the Communist Party. I asked Mr. Skinner if this opinion was also held by some people that I had shortly before sharply disagreed with. Namely, Howard Goddard and a couple more, and he said, 'Yes, that is also their opinion,' but it wouldn't make any difference because the decision to ask me to join the Party came from the Party itself. So I told Mr. Skinner that I don't want to join an organization the principles of which I can't go along with, and that it would be better for him and his organization and for myself if I didn't join. I declined the invitation to join.

"Q. Now, directing your attention, Mr. Mason—

"Mr. Taylor: Are you leaving that, Mr. Broome?

"Mr. Broome: Yes.

[fol. 315] "Mr. Taylor: Your Honor, we will request the usual cautionary instruction with respect to consideration of this testimony only with respect to the defendant Skinner."

The Court: (Reading) "Ladies and gentlemen of the Jury, you are specifically instructed that this alleged conversation between the witness and the defendant Albert Skinner can be considered by you in connection with the case of the United States of America versus Albert Skinner only, and cannot be considered by you in any manner or to any degree against any of the other defendants."

"Q. Now, Mr. Mason, I direct your attention to the year 1953 and particularly to the middle of that year, and ask you if you had occasion to have a conversation with the defendant Maurice Travis.

"A. Well, there were several conversations with Travis during that period.

"Q. And where did they take place, sir?

"A. One conversation took place in Butte, Montana. Another one took place down here in Denver, Colorado.

"Q. All right. Now, confining our questions and answers to the conversation in Butte, will you tell us as nearly as you can recall when that conversation was?

"A. I don't remember the dates, but it probably was in the latter part of July or early part of August.

"Q. Now, who was present at this conversation?

"A. During the earlier part of the discussion John Clark, President of the Union, was present. Ernest Salvas, at that time International Representative. But most of the conversation was between Mr. Travis and myself later, after we got away from Clark and Salvas.

"Q. All right, now confining our questions and answers to the time after you got away from Clark and Salvas, will you please tell us as nearly as you can recall what the conversation was, that is, what you said to Mr. Travis and what Mr. Travis said to you?

"A. Well, Travis said that now that we have got rid of Clark, let's get the situation here. I told him that he knows what the situation is. These people have been attacking us in the midst of bargaining, making it difficult for us, misrepresenting the issues in bargaining in Montana with the Anaconda Company, that the people that I represent are quite angry about the situation, but if it means fighting him and the Party boys, that let's have the fight out in the open. I told him that I had been invited to testify against him and that I had declined and refused to testify against him, and that there are times I'm sorry I did refuse to testify against [fol. 316] him, because these attacks I considered were dirty in view of the fact that we were in a very difficult bargaining position with Anaconda. Travis said that he had been misinformed on the issues involved in bargaining in Montana and he assured me that the attacks would be discontinued and wanted to know if I can be in Denver a day or two ahead of a previously scheduled wage policy meeting—conference, that he wants to talk over my objection to the way they have been handling the union with Pezzati and the boys and that if I would come to Denver a day or two,

we would have a chance to talk things out, that we've always been able to work things out together, and no use having a fight over this question.

"It was a lengthy discussion. At one point he asked if the Montana local union leaders, myself and people associated with me, would feel better if he stepped out as International Secretary-Treasurer of the Union, and someone like Albert Pezzati took over. I told him that we were not objecting to him, Travis, as a person, but our objection is to Communist Party control of the International Union, and that control would only be enhanced, made firmer, if a fresher man like Pezzati was to take over as the Secretary-Treasurership of the Union. I don't recall much more in the discussion. It was quite lengthy and dealt with in general my differences of opinion with the majority of the Executive Board and Travis's people.

"Mr. Taylor: Your Honor, may we request that the Jury be instructed that the testimony with respect to this meeting may be considered only with respect to the defendant Travis, and further that insofar as the witness has testified to his own statements they may be considered with respect to Travis only insofar as the Jury may find they were adopted or assented to by Travis.

The Court: (Reading) "Ladies and gentlemen of the Jury, are specifically instructed that this alleged conversation between this witness and the defendant, Maurice E. Travis, in Butte in July or August of 1950 can be considered by you in connection with the case of the United States of America against the defendant Maurice E. Travis only, and cannot be considered by you in connection with the other defendants. Specifically, as to the statements made by Mr. Travis, they of course can be only considered—or allegedly made by him, can only be considered in the case against him and statements made by this witness in the presence of Mr. Travis can be considered even against Mr. Travis only to the extent that you find from the evidence that Mr. Travis either assented to or adopted these statements.

[fol. 317] "Mr. Taylor: I believe, Your Honor, you said 1950 and I believe 1953 was correct.

"The Court: That is correct. This is 1953, this alleged conversation in July or August, 1953, instead of 1950. That's right.

"Q. Mr. Mason, you mentioned a conversation with Mr. Travis in Denver. Now, when was that conversation with respect to the one that you have just testified about?

"A. Some two or three weeks following the discussion I just testified.

"Q. Who was present at that conversation?

"A. It was a conversation between Travis and myself.

"Q. No one else present?

"A. No one else present.

"Q. Now, will you tell us as nearly as you can recall what the conversation was, that is, what you said to Mr. Travis and what he said to you?

"A. Well, I said to Travis, 'It looks to me as if a new crisis is developing within the Union, that membership here and there is grumbling as to the policies within the Union that we have been promised that appointments of organizers or otherwise called International Representatives, that a policy would be followed of trying to draw the appointments from among the members of the Union working in the mines and smelters and that instead of that they have been selected because they are members of the Communist Party.'

"I said to him that we didn't like the way the International Union paper was being used to further the line of the Communist Party, that we regarded the paper as defending the Soviet Union in its columns rather than dealing with the issues more direct and vitally important to the miners and smeltermen in the industry, that we resent very much being placed in a position of having to fight with Travis and his people in control of the Union for the restoration of the very democratic processes that we had enjoyed under the Constitution and down through the history of the Union.

"Mr. Travis said that he had had some discussions with Pezzati and the boys and that they are not in a mood to

make any deals with me, that he knows and that the boys know, too, that I have been in direct opposition to the Party, that my brother and I have been in direct opposition to the Party, that if I think that it's realistic to change the policies of the paper, that I have another think coming, [fol. 318] that we—and I assumed he was talking for himself, Pezzati and the rest of what we have known as his associates—'we don't feel this is the time to compromise. We feel that the Soviet Union emerged from World War II as the stronger force. We feel we have been able to withstand the expulsion from CIO and CIO attacks and various witch-hunting investigations, and that we just don't think this is the time to concede.'

"He said that 'You and Joe (referring to myself and my brother) have had your chance, you had a chance to join the Communist Party and had you done so you would be sitting in the councils with us, but you chose to instead fight the Party and that's the way I feel about it,' he said.

"I told him that if he feels that way we just as well throw the fight against the Communist Party control of this Union in the open but that if such a fight is thrown in the open we will not be as naive as some of the opposition to the Communist control of the Union had been in previous years, that we would choose our own battlefield and that we would raise these questions before the membership, that I hate to see a split in the Union and that's why I responded to a suggestion by him that we talk this thing out, but that it appears that nothing can be done, and as far as I am concerned the fight's out in the open.

"It was a rather lengthy discussion. I remember at this moment just this much of it.

"Mr. Taylor: Your Honor, may we request the same instruction as given with respect to the conversation at Butte?

"Mr. Broome: May it please the Court, it seems to me that the time has arrived in the presentation of this evi-

dence and because of the context of the evidence itself that perhaps some examination now should be given to the form of this cautionary instruction. It is a matter I don't think we could perhaps discuss in the presence of the Jury.

"Mr. Taylor: We agree with Mr. Broome, that it should take place in the absence of the Jury.

"Mr. Broome: May I make this suggestion? I have just a little farther to go with this witness and if I could complete, I have only one more incident, it would take maybe [fol. 319] five or ten minutes, if we could finish that, the cautionary instruction could still be given at a later time.

"The Court: What is counsel's feeling as to that?

"Mr. Taylor: If the Court will instruct the Jury that an instruction will be given about this and the other episode in due course, we have no objection."

The Court: (Reading) "Ladies and gentlemen of the Jury, there will be a cautionary instruction given you by the Court concerning this alleged conversation had between this witness and the defendant Travis in Denver sometime in 1953 and that will also apply to this subsequent incident that counsel for the Government is about to elicit some testimony from the witness concerning. That will be done at a later time."

"Q. Mr. Mason, did you attend the convention of the International Union of Mine, Mill and Smelter Workers in 1953?

"A. Yes, I did.

"Q. Do you remember where that convention was held?

"A. It was held in St. Louis, Missouri.

"Q. Now, either just prior to that convention or during the course of it did you have occasion to have a conversation with Charles Wilson?

"A. Yes.

"Q. Do you recall who was present at that conversation?

"A. Just Charles Wilson and myself.

"Q. Do you remember where it was specifically?

"A. The best of my knowledge, it was outside the convention hall, one of the corridors of the hotel.

"Q. All right. Now, will you please tell us, sir, as well as you can remember, what that conversation was, that is, what you said to Mr. Wilson and what he said to you?

"A. I told Charles Wilson that I heard that there has been a decision made by the Communist Party that he should not run for reelection, that room should be made for Asbury Howard, a representative of the Negro race, and that I don't like this decision any more than I liked the previous decision of a similar nature, that I am getting fed up with these decisions being made within the Party for the Union, that this question of elevating Negroes to offices is highly artificial anyhow, that in proportion to the members of the Union that there has been too much attention, too much stress placed on placing the Negroes in top leadership of the Union, and that we already have [fol. 320] the Negro race represented within the Union while many other racial and nationality groups were not represented. I urged Charles Wilson to fight the decision and told him that our people from Montana would back him up if he wants to fight the decision. He said that he's not going to fight the decision, that he was there when it was being made.

"I asked if it was a decision made by Communists within Mine-Mill or was it a meeting of the Communists in Mine-Mill with the other Communists that are not members of the Union.

"He said that it was a top level meeting of the Communist Party that made the decision but that he will go along with it.

"Q. Now, what office did Charles H. Wilson hold at that time?

"A. He was Eastern Vice President.

"Q. Do you recall, Mr. Mason, who was nominated at that convention in 1953 for the position as Eastern Vice President?

"A. Asbury Howard was nominated for that office.

"Q. Do you recall who it was that nominated him?

"A. I'm not sure, but I think Charles Wilson nominated Asbury Howard.

"Q. Mr. Mason, was there a secession movement in Butte after this convention?

"A. There was a sharp fight between myself and my associates in Montana and Mr. Travis and his associates in the leadership of the Union. There was an election in which they backed a candidate against me. I defeated that candidate, and then I advocated that the Local Unions in Montana withdraw from the Union, that it is impossible to reform things within the Union and that the best thing for the miners and smelter workers to do would be to leave the Union.

"We then accepted the offer of assistance from the United Steel Workers of America, but owing to some of the policies that Union advocated, particularly immediate action, the workers in the mines and smelters were confused and in the resultant election between the United Steel workers of America and Mine-Mill, Mine-Mill won the election and was certified as the bargaining agent.

"Q. Now, you referred to an election. What kind of an election was that?

"A. Those elections are known as certification elections.

"Q. Who conducted it?

[fol. 321] "A. The National Labor Relations Board.

"Q. And who were the two contestants in the election, if there were only two?

"A. The International Union of Mine, Mill and Smelter Workers and the United Steelworkers of America.

"Q. And do you recall when that election was held, please?

"A. In the latter part of March, 1954.

"Q. Did Mine-Mill have any representatives in the area participating in the election?

"A. Quite a number."

Mr. Taylor: Excuse me.

(Counsel conferred.)

(At the Bench.)

Mr. Broome: Counsel has called my attention to the fact that the answer to that question is going to involve Mr. Powers and Mr. Marcotti, who are not now involved in the case, so should we withdraw the question?

Mr. Taylor: Yes, actually though, you would be entitled to say Travis and Skinner were there.

Mr. Broome: Yes.

The Court: Stop after Travis—

Mr. Broome: Travis and Skinner.

The Court: Yes, all right.

In Open Court

The Court: Do you care to re-ask the question?

Mr. Broome: I will re-read that question.

The Court: Yes.

"Q. Will you state who they were, as nearly as you can recall at this time?

[fol. 322] "A. Well, I know that Travis was there and Skinner was there."

"Mr. Taylor: Your Honor, I regret to interrupt. We were under the impression their preliminary was going into one episode, then we were going into chambers. This seems to be far afield from the other episode."

"Mr. Broome: I have finished now. That completes the direct."

Colloquy Between Court and Counsel

At The Bench:

Mr. Witt: Now, Your Honor, I believe I am talking for the record here, that it is from that point on, after you let the jury go, we had a little colloquy at the bench and then we went into chambers and discussed the business of the cautionary, and at the end of the colloquy it worked out that no change was made in it, and if you come over

to page 444 of the printed record, we are back in open court, and you gave the cautionary, and that finished up the Mason direct testimony.

The Court: Did you want that part of the record between what Mr. Broome has just read into the record and the time when we reconvened the court made a part of the record?

Mr. Witt: Yes, I suppose so.

The Court: That part does include 441 and 443, some business about 3500?

Mr. Witt: We may as well have it in.

Mr. Taylor: The whole thing.

Mr. Witt: Yes, it would take me too long to explain.

The Court: Then, can you identify that in this transcript you have by page number so the reporter will know?

Mr. Broome: Yes, I think I can. I was just trying to get down to the point where—

[fol. 323] Mr. Witt: Well, it begins right after you stop, Mr. Broome.

Mr. Broome: That's the colloquy?

Mr. Witt: Yes, that's the colloquy.

Mr. Broome: Open court, page 1316.

The Court: Where did you stop?

Mr. Broome: I stopped at page 1294.

The Court: Mrs. Spencer, you will put in the record from pages 1296, where the Court starts to speak, through the middle of page 1316, and that's in this official transcript. That takes us to the open court.

Mr. Witt: Yes, and, Your Honor, we will read that now then to the jury and then that takes us to the cross, you see. You see, after that we go back into chambers on other matters, and then a lot of other things happen and Mason's cross begins a long way further on.

The Court: All right.

Mr. Witt: There is one other problem, I think we are back at the point that we go back to the open court. In view of the editing which was done to the last answer, I don't think the first paragraph is necessary in the cautionary.

Mr. Taylor: That's right.

Mr. Broome: Yes, that's right.

The Court: All right, then let's start with the second paragraph.

Mr. Witt: You followed that, Mr. Broome?

Mr. Broome: I am afraid I got lost here.

The Court: Well, this part that refers to Travis, we will omit that. It was out of the answer.

[fol. 324] Mr. Broome: Yes.

Reporter's Note: (The following excerpted portion of the official transcript of the previous trial, pages 1296 through 1316, was not read aloud to the jury. At the direction of Court and counsel, this portion is being inserted in chronological order at this point in this record.)

"The Court: All right. We will take a break at this time, ladies and gentlemen of the jury. You may leave the jury box and the break will be for approximately fifteen minutes. During this recess, as I have previously cautioned you, please do not discuss the case either among yourselves or with any other person.

"You may take the jury out.

"(Jury excused from the courtroom.)

"The Court: Now, gentlemen, do you have a suggested form of the cautionary instruction that you think should be used at this point?

"Mr. Broome: I haven't given it any thought, to shape it up, but it seems to me at this point that there is very definite evidence emerging of the existence of a conspiracy and for that reason there should be some change in the form of the precautionary instruction, but, frankly, I have had no time at all—

"Mr. Taylor: I beg your pardon, Your Honor. Don't you think we should have this in the absence of the witness? We suggest that it be done in the absence of the witness.

"The Court: Well, I have no objection, but I see no particular reason this phase of it ought to be in the absence of the witness.

"Mr. Taylor: It is a little unpredictable what we may have to say about the evidence and the witness has not yet been cross-examined.

"The Court: All right. We will go to Chambers.
[fol. 325] "Mr. Taylor: I didn't mean to inconvenience the Court that way—

"The Court: Well, it is time for a break, I guess.

"In Chambers

"The Court: Do you want to amplify your statement any further, Mr. Broome?

"Mr. Broome: Well, as I stated to the Court, I have not had time myself at any time to give consideration to the form of a cautionary instruction. My point is that at this time it is my view that there is some evidence of the formation and existence of a conspiracy, and that being the case, that the form of the cautionary instruction perhaps should be different than has been used up to the present time.

"Mr. Taylor: I wonder, Your Honor, before I comment, if Mr. Broome would state what he thinks the form should be.

"Mr. Broome: Well, I just stated I haven't had time to give thought to the matter at all, and right at the moment I am pretty tired and I would be hard put, I think, to make any solid suggestion as to how the Court should treat it.

"Mr. Taylor: Your Honor, may I then comment? If I rightly understand Mr. Broome, his observations now are directed to the witness's testimony about these last two episodes, the one in Butte in 1953, and the ensuing one—no, I beg your pardon. I guess Your Honor gave the cautionary one on Butte and didn't give the one on Denver. It was the Denver one that Mr. Broome made a suggestion on, I guess, wasn't it? Did Your Honor give the cautionary on Butte? I believe so.

"The Court: I believe I did, but I didn't on the one with Travis in Denver.

"Mr. Taylor: Or Charles Wilson in St. Louis.

"The Court: That's right.

"Mr. Witt: I am sorry, I may be wrong, if the Court please, but my recollection is that Mr. Broome made his [fol. 326] suggestion when Mr. Taylor asked for the cautionary with respect to the Butte conversation, so that was also held up.

"Mr. Broome: I believe I did, and my reason for it was the testimony immediately preceding that with relation to Skinner's invitation to join the Party.

"Mr. Taylor: That's right. I have a note it was given on the Skinner one but not on the Butte one or the Denver one or the St. Louis one.

"The Court: I believe you will find there was one given on Butte. I recall it because I was about to say Butte, Montana, and I remember that they didn't use the word "Montana", they just used "Butte" and I used "Butte."

"Mr. Taylor: We can check on the record.

"The Court: I have no objection to doing it over if there is any objection about it.

"Mr. Taylor: I wanted to indicate that I don't think we even reached the question of whether there is evidence in on the conspiracy yet because with respect to all three of these, if there are three involved, and the last two if there are only two involved, it is quite plain that these remarks alleged to have been made by Travis in two cases and Wilson in one are in no sense in furtherance of the conspiracy charged in the indictment. Now, this conversation in Butte, if that wasn't involved in the cautionary, as I think it was, was about these jurisdictional organizing difficulties in Montana, and have nothing to do with any affidavits. The one in Denver again is about the use of the Party paper. Party control of the Union, etc., and not a word about the handling of affidavits, and certainly that is equally true of the one in St. Louis with respect to this talk about who should resign as Eastern Vice President.

"Now, the decisions of the Supreme Court and in this Circuit are all entirely clear that even during the pendency of an alleged conspiracy the statement of a conspirator would not be admissible against co-conspirators unless it is in furtherance of the conspiracy and none of these statements approach meeting that requirement. If they did, we would then be confronted with the further problem Mr. Broome raises about proof aliunde as it is called, of the [fol. 327] existence of a conspiracy, because that hurdle would have to be surmounted, too, but I don't think we ever got there because plainly enough none of these are in furtherance of the conspiracy.

"Now, if I might make one further observation with respect to Mr. Broome's comments about these events tending to establish conspiracy, once again I don't think there is any question about that, at least here, in this circuit. There are two decisions squarely on the motion that conspiracy cannot be proved against co-conspirators by statements made outside their presence. All these statements, with the exception that Mr. Mason has testified to, except the last one, have been statements and conversation between—oh, that's right, there was one with Skinner, but that's not in furtherance here, plainly—

"Mr. Broome: I disagree with that.

"The Court: Well, let him finish.

"Mr. Broome: Pardon me.

"Mr. Taylor: These are all discussions between Travis and Mason, and you certainly can't prove conspiracy with the other defendants by conversations with Travis outside their presence. The case that I most plainly have in mind is Thomas against the United States, in this circuit, 57 Fed. 2d, 1039, where it said in the decision by Judge Phillips, quoting from 1042, 'The existence of the conspiracy charged cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirators done or made in his absence.' And the same thing is said in a later case in this circuit, the Minner case. So we have all those legal problems before we ever get to stacking up the record here, and I would submit the record doesn't show anything like conspiracy. It might, for purposes of argument at least, in the case that there is some question about the truth of the affidavits that the defendant Travis signed, and I say that only for the purposes of argument, but even assuming that, that's got nothing to do with whether it is an agreement made among these eleven defendants, to conspire that false affidavits be filed. There's not a word about that yet. I don't think Mr. Broome has made a beginning on the conspiracy, but as I say, we don't have to approach that question yet.

[fol. 328] "Mr. Broome: Have you finished, Mr. Taylor?

"Mr. Taylor: Yes, except to say formally that I therefore think the Court should give the exact same instruction on the last three episodes that has been given up to this time.

"Mr. Broome: Your Honor, one point of disagreement with Mr. Taylor is this. It is my view that the testimony with respect to the conversation with Albert Skinner is definitely an overt act, that here is an effort by Skinner to get a man who is not then a member of the Communist Party to join the Communist Party and thus place him in a position where he, too, in complying with the Union, will be filing a false affidavit.

"Now on the general problem, I recognize that it is somewhat difficult and perhaps—we don't want to be dogmatic about it, and since, as I said, I have not myself had time to give thought to a form of a cautionary instruction, perhaps it would be as well and would solve the immediate problem if the same precautionary instruction were given, because I think it could be handled later on by some instruction by the Court to the Jury at a later point in the case. Perhaps that would be at this time the best way to solve the legal problems which Mr. Taylor presents.

"Mr. Taylor: Well, it certainly eliminates them for a moment. If Your Honor gives the same instruction as before on these episodes, then we can postpone to such later time as Mr. Broome wants to raise it the matter of varying them in any way. In the meantime, if it would assist the Court for counsel for both sides to prepare memoranda on this question, we will be glad to do so.

"The Court: I don't think it would be of any particular assistance. When the Government establishes, if they are able to establish, that certain overt acts, or that affidavits were actually filed, that is one of the important phases of this. Now it is my understanding there has been some stipulation made with reference to these.

"Mr. Broome: That's right.

"The Court: But that's not before the Jury at this time.

"Mr. Broome: I know, that's true, and we had intended at what we consider to be an appropriate time in the progress of the case to offer all of these affidavits.

[fol. 329] "The Court: Well, see, if you offer evidence subsequent—which you have done here—by this witness at any rate—subsequent to the filing of several of these affidavits, that is, as alleged in the indictment—I don't know

when they were filed. Your allegations show, I think, well, here is August, 1949, filing of affidavits.

"Mr. Broome: Yes, of course. The affidavits, if the Court please, that we will have to offer are the affidavits of these various defendants who filed affidavits from the time they first qualified down through the duration of the case to 1956.

"The Court: Yes. But until you have some affidavits in, you haven't got one of the fundamental, important points of your alleged conspiracy, that is, a conspiracy to defraud the Government by filing false affidavits.

"Mr. Broome: Well, it might be then that this—

"The Court: I think—I don't agree with counsel that some of this testimony here does not go to the conspiracy, I think it can be treated as such, some of it. In furtherance of it, I mean. Certainly I agree with the Minner case and the other case counsel cited, Judge Phillips' opinion, that you can't use evidence of a co-conspirator made outside the presence of the defendants to establish the fact that that defendant was a co-conspirator, that is, the one that is outside the presence of. But once there is evidence that a conspiracy existed, then any statement made by a co-conspirator in continuation of the conspiracy, or in furtherance of it.

"Mr. Taylor: Must be in furtherance of it.

"The Court: Or continuance. That's right, then—yes, and in furtherance of it. That's right.

"Mr. Taylor: Right. If Your Honor's present feeling is that, we would like to have the opportunity of filing a short memorandum on the subject, because we think the ruling on the admission of this testimony against the other conspirators is of course going to be quite crucial here, and we would welcome an opportunity for further hearing on this at such time as Mr. Broome wants to renew his motion for changing instructions.

[fol. 330] "The Court: Well, that can be done, of course. You can present your argument, of course, but I don't want to take a long court recess, I mean, for that.

"Mr. Taylor: Oh, no, no, Your Honor. I meant in the neighborhood of fifteen or twenty minutes.

"The Court: Oh, certainly.

"Mr. Taylor: We will have the memorandum prepared out of court hours and it won't take long to argue it.

"The Court: Do I understand, Mr. Broome, it is satisfactory to you, or your suggestion the Court give the same cautionary instruction concerning the last two or three instances concerning which the record may reflect there have been no instructions, as the Court gave concerning other conversations other witnesses testified to?

"Mr. Broome: That will be satisfactory. I think we can cover it in a later instruction. But now, in view of the comments made by Your Honor, I think we might make a rapid change in our own procedure and proceed in the next session of the Court to offer into evidence the affidavits in the case.

"The Court: Well, you handle your case as you are advised. I don't want to suggest.

"Mr. Broome: Yes. Well, that's my present feeling.

"The Court: All right, then what else can we accomplish at this moment?

"Mr. Witt: May I have a moment to confer with my associates?

"The Court: All right.

"Mr. Broome: Perhaps you would like to have something to say on this, Mr. Stoddard.

"Mr. Stoddard: Well, I would go by your better judgment.

"Mr. Broome: Go ahead.

[fol. 331] "Mr. Stoddard: If I might say, Your Honor, I refer your attention to 20 F.R.D. at page 269, form 43(c) 3, which I believe to be instructions which would be adaptable at this time as a cautionary instruction as to what actions and declarations are admissible against other co-conspirators.

"Mr. Witt: What's that, Mr. Stoddard? Judge Mathes?

"Mr. Stoddard: Yes.

"Mr. Taylor: We would be glad to look at it, Your Honor, but I thought at the present time we would go ahead on the present basis until such time as Mr. Broome wanted to make a further request.

"The Court: Yes. Well, I think yours is premature, it says if and when it appears from the evidence that a conspiracy existed. He hasn't gone that far with his evidence yet. I am familiar with that, I have a copy of it.

"Mr. Taylor: Mr. Witt has a couple other matters.

"The Court: All right.

"Mr. Witt: First, if the Court please, we move to strike Mason's testimony with respect to the people who were in Butte in connection with the NLRB election insofar as that testimony refers to, as I call it, refers to "all of Mr. Travis's associates". Of course, we are not moving to strike the testimony—just the last phrase—not where he names particular people, Travis, Powers, Skinner and Marcotti. But he added the phrase, as I caught it, "all of Mr. Travis's associates". That phrase is what I now move to strike.

"Mr. Broome: We consent to have that go out.

"The Court: All right.

"Mr. Taylor: Then I guess the Jury should be instructed.

"The Court: Let's see, "all of Mr. Travis's associates", was that the wording?

"Mr. Taylor: Miss Wine reported that.

[fol. 332] "The Court: Yes, that's what he said, "all of Travis's associates", she didn't read the word Travis.

"Mr. Witt: So, Your Honor will instruct the Jury.

"The Court: Yes.

"Mr. Witt: Now, we have the discovery problem, if I may call it that, the motion under 3500 and the motions with respect to this man's Grand Jury testimony. Does Your Honor want us to make those now?

"The Court: Yes. You have released the witness, haven't you? You are through with your direct?

"Mr. Broome: We are through with the direct. In addition to that I think perhaps we ought to discuss a further schedule for the day some, and I don't know what Your Honor's intention was today, whether to break it into two sessions, run until twelve with a recess and have a session this afternoon. It seems to me that that would be expedient here, while we produce the documents that counsel are requesting. And give Your Honor time to make the appro-

priate excisions and perhaps the cross-examination of the witness could proceed in the afternoon session.

"Mr. Taylor: May I comment?

"The Court: Yes, sir.

"Mr. Taylor: There are two problems about that. In the first place I think Mr. Francis had spoken to Your Honor before about his problem in the Supreme Court this afternoon. Secondly, even after Your Honor makes excisions, Mr. Witt is going to need time to look over the reports prior to cross-examination, so both those things make a session on into the afternoon difficult, whereas, for the next—I mean, on our original idea of running along until one-thirty, two, two-thirty, we would be better off, couldn't we do it the same way we did last week and have Mr. Broome put his next witness on direct, as he did last week, and then we can look overnight at the documents and handle the cross tomorrow.

"The Court: Were you going to examine the next witness, or was Mr. Worthington?

[fol. 333] "Mr. Broome: No, I was going to examine the next witness, but now I have in mind, particularly since the Court made a comment about the affidavits, that if we have just a little time to get these affidavits in order, that would be our next procedure, to offer the affidavits and there is quite a large number.

"Mr. Taylor: Won't take very long to do that.

"The Court: They have been stipulated, haven't they?

"Mr. Broome: The authenticity of the affidavits has been stipulated, but we would want to offer them in evidence.

"The Court: Well, I'll tell you what I want to do, gentlemen, and I'll try to accommodate. It is obvious I can't accommodate everybody, and I will try to accommodate the largest number interested. I want as much testimony in as possible, so that we will not have any more undue or unnecessary delays in connection with 18-3500. That's the mechanical problem we have had up to this point in this trial. We are going to have it as long as you put on witnesses, as the Government puts them on. We have got to face it. So I would like to get this material to the defense counsel as soon as possible, so that we can go on. Because

if we don't do that now, we take one witness, then tomorrow we will just take one witness, because we will have to take another recess and I don't want just a couple of hours testimony a day.

"Mr. Witt: The only way to do it is put on another witness and—

"The Court: I realize that, and if Mr. Broome isn't too tired to go ahead with this other witness—I don't want to punish you—

"Mr. Broome: Would there be any serious objection to offering the affidavits that we have in mind at this time?

"The Court: I have no objection. You do as you want. You handle your case as you please, but I mean by that, are you still going to have time to get this other witness on?

"Mr. Broome: Yes, if we consume the time—if there is time left over after we handle the affidavits, then we are prepared to put the other witness on.

[fol. 334] "The Court: All right.

"Mr. Witt: There will be no objection to the receipt in evidence of the affidavits, Your Honor.

"Mr. Broome: It takes some time to read the affidavits. There's about sixty of them.

"Mr. Taylor: They're all alike aren't they?

"Mr. Witt: Certainly, the statutory form, and all that's necessary—I don't want to suggest to Mr. Broome how to do it—is the name of the affiant and the date. I don't see the necessity of reading sixty identical affidavits based on Section 9 (h).

"The Court: Well, I don't know why you need the affidavits now, if you didn't need them before this witness went on. But if you do, you do.

"Mr. Francis: There is a problem, too, if he introduces the affidavits now, Your Honor, he may be introducing affidavits subsequent in time to the last testimony and they are left dangling in space. The last testimony was 1953.

"The Court: Did I understand you to say you are not going to object to the admission of the affidavits?

"Mr. Witt: No, we are not. They are Government records. They were filed. No question about those.

"Mr. Worthington: They are exemplified copies.

"Mr. Broome: Yes, they are photostatic copies.

"The Court: Well, I don't care what they are, if they don't object. That shouldn't take any time to get them in evidence, that's what I am getting at.

"Mr. Broome: It won't take a lot of time, I don't think, perhaps. But I would like to do that at this time, as our next procedure.

[fol. 335] "The Court: Well, the next procedure better be —I had better take over. The next procedure will be to accomplish such orders or request or whatever counsel wants with reference to any 18-5500 as to the witness on the stand. We never have agreed on anything in this trial, I don't know why I even try to.

"Mr. Broome: So you take over, Mr. Worthington.

"The Court: Well, wait until they make their request, see what they want.

"Mr. Witt: If the Court please, at this time the defense moves for the production by the Government of all statements under Section 3500.

"Mr. Worthington: There are two such statements. This is a photostatic copy of the original.

"The Court: Well, you better identify them for the record here.

"Mr. Worthington: This is a statement made by William Mason, acknowledged March 17, 1954. We must have the other one on the table. The other one is a statement by William Mason—I will furnish the date in just a second.

"The Court: All right.

"Mr. Witt: While they are doing that, may I get something from the courtroom, I may have to refer to? Take me just a moment.

"The Court: I believe I'll send the Jury to lunch. It's 12:00. So I am going to send them out to lunch. Tom, will you have the bailiff bring the Jury in, please?

"Mr. Worthington: The date of that statement by Mr. Mason, made in Butte, Montana, April 12, 1955, consisting of eleven pages.

"Mr. Taylor: April 12?

"Mr. Worthington: Yes. I would like permission at this time to give the defendants photostatic copies.

[fol. 336] "Mr. Taylor: That, I am sure, will be agreeable with Mr. Witt. Here he comes.

"Mr. Worthington: Also, two additional documents.

"Mr. Witt: Excuse me, Mr. Worthington, let me get a chance to catch up with you. All right.

"Mr. Worthington: There are two additional documents which bear either the signature or the initials of William Mason, given to the Immigration and Naturalization Service, both of which will require excision, or at least we would like the Court to look over to see whether or not the excision should be noted.

"The Court: All right.

"Mr. Worthington: We have so indicated those excisions. Other than that, there are no other statements.

"The Court: Okay, is this all of it?

"Mr. Worthington: That is all of that one.

"The Court: Oh, this is just one statement.

"Mr. Worthington: Now, that, if I may be presumptuous, Your Honor, is a copy which we have actually excised, and if it meets with the Court's approval, the physical work has been done and the yellow paper contains that which has been excised.

"The Court: Well, you don't ask for much on this one. All right.

"Mr. Witt: I wonder, before you pass these two documents, Mr. Worthington, can you just give us the dates of these, if you don't mind?

"Mr. Worthington: Yes. The one the Court now has, is a document—

"The Court: Excuse me, I am going to go in court now and recess the Jury. If you gentlemen want to come in now, you may.

[fol. 337] "In Open Court

"Mr. Taylor: May we approach the Bench a minute, Your Honor?

"The Court: Yes.

"At the Bench

"Mr. Taylor: I am left in confusion about the cautionary instruction on these last three episodes. If I rightly understood Mr. Broome in chambers, he has withdrawn any request for any change and has gone back to saying we can do that later, and have a regular cautionary instruction now. If so, I would like to request that be done now, because the evidence is still fresh in the Jury's mind, and so forth. It is the Wilson conversation in St. Louis and the Travis conversation in Denver. And the one in Butte, we weren't clear about. My recollection is the same as Your Honor's, that you cautioned them already.

"The Court: That's what I am going to do. Do you want to talk to Mr. Broome before I do it?

"Mr. Stoddard: I think that's right. I would like to have it deferred until after lunch, so we can talk it over.

"The Court: No, I am going to do it now, unless you want to go talk to him first. If you do, you can.

"Mr. Stoddard: I think it's all right.

End of Reporter's Note; in Open Court

Reporter's Note: (The following excerpted portions of the official transcript of the previous trial, page 1316, was not read aloud to the jury by the Court. At the direction of Court and counsel, this portion is being inserted in chronological order at this point in the record.)

"The Court: Ladies and gentlemen of the Jury, I am going to recess you for a short time here, pretty soon, but prior to that at this time I want to tell you that the latter part of this witness' testimony which was in substance—that is, when he was testifying as to who were present up in Montana during this so-called election that the NLRB was supervising—the words "all of Travis' associates" [fol. 338] were there, or something to that effect, that you will recall the witness testified to, those words are stricken from the record, that part of his answer. That is, "all of Travis' associates", and you are instructed to disregard that."

End of Reporter's Note

The Court: (Reading) "Now further, ladies and gentlemen of the Jury, in the latter part of this witness' testimony there were three conversations that he testified to that I am not sure—one of which I am not sure I gave you the cautionary instruction on or not. The other two I am sure I did not. At this time I want to instruct you specifically as to those three conversations. One was between this witness, that is, he testified it was between him and Mr. Travis in July or August in 1953 in Butte, and two or three weeks later he testified that he had a conversation with the defendant Travis in Denver. Now as to both of those conversations you are instructed specifically, ladies and gentlemen, that any testimony from this witness concerning this alleged conversation by the witness—or these alleged conversations between the witness and the defendant Travis can be considered by you in connection with the case of the United States against the defendant Travis only and cannot be considered by you in any manner or to any degree in connection with any of the other defendants. Also, this witness has testified to an alleged conversation that he had with the defendant Wilson in 1953 in St. Louis at the time of the International Union's convention. Now as to that conversation with Mr. Wilson, you are specifically instructed that any testimony which this witness has given concerning that alleged conversation can be considered by you in connection with the case of the United States against the defendant Charles Wilson only and cannot be considered by you in connection with any of the other defendants. I think you understand that applies to the three conversations.

"Do you have something further?"

"Mr. Taylor: Would Your Honor add with respect to the witness; testimony about his own statements to the defendants Travis and Wilson?"

The Court: "Yes. And in connection with these respective conversations that the witness has testified to, any statements made by the witness to Mr. Travis in connec-

tion with any of these conversations that he has referred to should not be considered against Mr. Travis except insofar as you may find from the evidence that Mr. Travis [fol. 339] may have consented to or adopted the statements. And with reference to the alleged conversation that he had with Mr. Wilson as to any statements that this man may have made to Mr. Wilson, you are instructed that those statements cannot even be considered against Mr. Wilson except insofar as you may find from the evidence that Mr. Wilson assented to the statements or adopted them."

That seems to complete that phase of it, gentlemen.

Mr. Broome: That concludes our presentation.

Mr. Witt: May I talk to Mr. Broome a moment? We may clarify this.

The Court: Yes.

(Counsel conferred)

Mr. Broome: May this document be marked as Government's Exhibit No. 9?

(Government's Exhibit No. 9 was marked for identification.)

Mr. Broome: If the Court please, the Government offers in evidence at this time Government's Exhibit No. 9.

(Government's Exhibit No. 9 for identification was shown to counsel.)

Mr. Broome: Formerly No. 15 in the transcript we just read.

Mr. Taylor: Same objection, Your Honor. No objection to authenticity.

The Court: The objection will be overruled and the exhibit will be received.

(Government's Exhibit No. 9 for identification was received in evidence.)

* * * * * * *

[fol. 346]

MOTIONS ON FIRST TRIAL TO PRODUCE GRAND JURY TESTIMONY OF MASON, COLLOQUY AND RULING

"Mr. Witt: Yes. While we are getting 3500 out of the way, since we are sure there would be no dispute that Mason did testify before the Grand Jury, to which I have already referred, the one in 1954 and the one in this case, in 1956, both in this court, at this time we move for the production to the defense of Mason's testimony on those occasions. The first relating only to Travis in 1954, and the second relating to all these defendants in 1956 on the [fol. 347] ground that in the case of this witness there is a particularized need for such production directly to the defense.

"The Court: You concede that the witness did appear before the two grand juries?

"Mr. Broome: That's correct, Your Honor.

"The Court: And testified?

"Mr. Broome: That's right.

"The Court: All right, the record may so show that. I think it's not necessary to argue this point because we have been over it before and the Court has—except the question of need—and I find no evidence of any particularized need or any need in this instance, for the production of the Grand Jury minutes of either the '54 or '56 grand jury. Therefore, the motion will be denied.

"Mr. Witt: Therefore, do we take it, in view of what Your Honor just said, Your Honor would also deny the alternative motion along the lines we made in the cases of the other witnesses.

"The Court: Yes. Such motion would also be denied. It may be considered as having been made and denied for the purpose of the record.

* * * * * * *

[fol. 349]

PART OF GOVERNMENT'S EXHIBIT NO. 9 READ TO JURY

Mr. Broome: Ladies and gentlemen of the jury, this is an excerpt from the convention of the International Union of Mine, Mill and Smelter Workers, held in St. Louis, Missouri, at the Hotel DeSoto, September 14th to 19th inclusive, in 1953.

This is by President Clark: "Nominations are now open for Eastern Vice President. The Chair recognizes Brother Wilson."

"Vice President Wilson: Don't anybody get excited. I'm not going to nominate myself. (Laughter) The excitement should come my way because it is very seldom that a man gets the opportunity to do what I intend to do and I want to place a man's name in nomination that all of us know in this room, I think. And I have had the privilege of working side by side with this brother for years and I know he is a capable brother, and I know he will make, if elected to this office, a wonderful and a most capable vice-president of this great International Union. The brother that I propose today has had a wonderful line of experience, not only has he had experience in the mines, he has had experience in the church, on the battle line of actual battles. He was one of the fellows that helped win the collar to collar pay in Bessemer, Alabama, for the first time on the North American continent. That is something to be proud of, coming from the South. His most recent battle that we know about is the "Battle of Jonesboro."

"Since the time I first joined the International Union of Mine, Mill & Smelter Workers, I had great pride in the Constitution of this International Union, because I have been oppressed by the mine operators in holes that were not fit for animals to go in much less human beings.

"And when I was confronted to join the union and read its Constitution, I said that must not be a bosses' organization. In this Constitution it says this organization does not discriminate because of race, creed or color, and I said

to myself I can't see anything wrong with that. Evidently the bosses didn't make this constitution because in the shack houses they discriminate but underground they put you all under the same mudstick together. By the time you come out in the light where the public can see you, they separated you again. And I have been thinking for sometime that I could never, no matter how hard I tried, put myself in the shoes of the brothers of the minority groups in this country. I could see how hard I was oppressed but I couldn't put myself in their shoes. If I could buy a ride on the streetcar I could take any seat where available. But if they could buy a ride with the same kind of money, they had a separate seat available. If I had the money and [fol. 350] they had the money, I could buy the best of food in the best up to date restaurants but they can't do that. So taking all of these things into account and fighting the boss across the bargaining table, when we say we want equal rights in this plant for advancement for jobs, for other conditions, and the boss would smile and say you don't practice this in your own union, I don't think you can force us to do it as long as you don't do some practicing of what you preach. And this year I made up my mind to propose to the other Executive Board members that we support a Negro for Eastern Vice-President of this International Union—not giving them anything but making it possible that they may be represented at the top of this International Union. I know a lot of people said to me, Wilson, you ought to think about your own future. Well, I thought about that when I was about 18 years old. I was taught in high school that I had an equal chance, that I could be president of the United States, I cannot be president of the United States. And unless we make a way for guys in the minority in this union they cannot be president or vice-president in that capacity. And there are no more faithful people, maybe some as faithful but no more faithful than the fellows I work with in the South among the Negro people. Mexican-Americans may be just as faithful, I didn't have occasion to work with them. I want to place

a name of a brother I find no fault with, a brother I respect all the years I worked with him, and a lot of the fellows that work with him have the same opinion. I want to place the name of Asbury Howard as candidate for Eastern Vice-President of this International Union."

Mr. Broome: That concludes the presentation.

Mr. Witt: Give us a moment at table, if the Court please?

The Court: All right.

(Counsel conferred.)

Mr. Taylor: Your Honor, can we request the precautionary instruction with respect to the document just read?

The Court: Ladies and gentlemen of the jury, you are specifically instructed that any testimony that was elicited from the last witness through the document, Government's Exhibit No. 9, which was Government's Exhibit No. 15 in the previous trial, which was received in evidence and which was read by Mr. Broome just now, can be considered by you, that is, this purported statement that Mr. Wilson [fol. 351] made at the convention can be considered by you only in connection with the case of the United States against the defendant Wilson, and should not be considered by you in any manner or to any degree against any other defendants, except as you may find, if you do find from the evidence, that—well, that's as far as we should go—should not be considered by you in any manner, to any degree against any of the other defendants.

(The questions on the following cross-examination of William Mason were read by Mr. Witt, Mr. MacDonald continuing to read the answers of the Witness Mason.)

"Q. Mr. Mason, have you given testimony about Travis and Mine-Mill in other proceedings?

"A. Yes.

"Q. Will you tell us in what other proceedings taking them, if you can, according to your best recollection, chronologically?

"A. At the trial of Maurice Travis. At the—
"Q. Where was that?
"A. Here in Denver.
"Q. And when was that, Mr. Mason?
"A. 1955, I believe.
"Q. Can you tell us the month?
"A. It would be towards the end of the y ar.
"Q. All right.
"A. At the retrial of Maurice Travis.
"Q. Here in Denver, also, Mr. Mason?
"A. Here in Denver, also.
"Q. And can you give me the month and the year of that?
"A. In January of 1958, I believe.
"Q. And the other proceedings in which you testified about Travis or Mine-Mill?
"A. In a hearing conducted by the NLRB in Washington, D.C., in 1954.
"Q. What month in 1954, do you remember that?
"A. I don't recall the month.

"Mr. Witt: All right. For the sake of expedition, if the Court please, I propose to stipulate that the witness Mason testified at NLRB proceedings in May, 1954, on the first trial of defendant Travis in December, 1955, and the second trial of the defendant Travis in January, 1958.
[fol. 352] "Mr. Broome: I suppose that's correct, Your Honor. If counsel says it is, I assume it is.
"Mr. Witt: I have the transcript here, if Mr. Broome wants to look at them.
"Mr. Broome: No, I don't care to look at them.

"Q. Mr. Mason, besides these proceedings, have you given testimony before a Grand Jury here in Denver about Travis or Mine-Mill?
"A. Yes.
"Q. On one occasion or on more than one occasion?
"A. I believe on two occasions.
"Q. And when was the first one by month and year, if you can recollect?

"A. I believe the first one was in 1954. I don't recollect the month. I believe the second one was in 1956. I am not quite sure of that.

"Q. And the first one was before the Grand Jury which indicted Travis in his own case, do you know that?

"A. Yes, I believe that is correct.

"Q. And the second, that is, 1956, when you testified before a Grand Jury, that was the Grand Jury which handed down the indictment in this case, isn't that correct?

"A. I believe that's correct.

"Q. Mr. Mason, you gave testimony yesterday, I'm sure you recall, about a conversation with the defendant Travis in 1949 about his statement resigning from the Communist Party. You remember—

"A. Yes.

"Q. You gave that testimony yesterday. Have you testified about that incident on previous occasions?

"A. Yes.

"Q. Will you tell us on what previous occasions you have given testimony about that incident?

"Mr. Broome: Object to that, Your Honor.

"The Court: What's your ground?

"Mr. Broome: Well, counsel has a transcript of the record. I think the proper procedure if he has such transcript would be to present the transcript to him and interrogate him as to whatever questions he wishes to ask with respect to this testimony.

[fol. 353] "The Court: Objection sustained.

"Mr. Witt: May I be heard on that for a moment, Your Honor?

"The Court: All right.

"Mr. Witt: If the witness can answer these questions without reference to the transcript, I think I can ask him. I may not have to impeach him with the transcript if he gives testimony that seems to me does not require impeaching.

"The Court: All right, then I will withdraw my previous ruling and let the witness answer the question if he can.

"Q. Do you remember the question, Mr. Mason?

"A. I believe I answered it.

"Mr. Witt: May I have the witness's last answer read back, please?

"(Record read: 'Question: Have you testified about that incident on previous occasion? Answer: Yes. Question: Will you tell us on what previous occasions you have given testimony about that incident?')

"Q. That's the question, Mr. Mason, which the reporter just read.

"A. At the trial of Maurice Travis and at the retrial of Maurice Travis.

"Q. Any other proceedings on which you testified about that incident?

"A. To the best of my knowledge I don't think there was any other incident.

"Q. Mr. Mason, in view of that I will ask you whether you now recollect that when you appeared in the NLRB proceedings you testified about that incident?

"A. I can't recall. Perhaps I did.

"Q. Well, don't you recall, Mr. Mason, that in that proceeding on direct examination Mr. Foley asked you about that particular conversation with Travis, about his resignation, and you testified that it took place in July, '49, in Chicago at the Hotel Sherry. Do you remember that?

"A. I remember testifying as to a resignation statement of Maurice Travis, but at the moment I can recall testifying only before the trial and retrial. It's very likely that I testified on that question at the NLRB hearing also. I don't recall it.

[fol. 354] "Q. Mr. Mason, in view of that I will read you the following questions which were put to you before the NLRB by Mr. Foley, the board attorney, and your answers. This is at page, so the record will show, 115 of the transcript of the NLRB proceedings.

By Mr. Foley:

'Question: Referring to the Executive Board meeting that took place during the dates of July 19 through July 22, 1949, I ask you if the Executive Board took any action during that time at that particular meeting in regard to the discussion of affidavits required by Section 9(h) of the NLRB Act, as amended.

'Answer: The Executive Board adopted a statement submitted to the Board by the President which proposed that the union officers comply with the provisions of the Act that you refer to.

'Question: Comply with Section 9(h) of the National Labor Relations Act as amended?

'Answer: Yes.

'Question: —'

"Mr. Broome: May it please the Court, I don't believe that the part of the transcript that counsel is now reading has any relation to what counsel is interrogating the witness about.

"Mr. Witt: I am coming to that, if the Court please. I want to give the witness the context, otherwise I think it would be unfair to the witness to jump him right to the question. If Mr. Broome wants me to jump right to the question, I will be glad to.

"Mr. Broome: I don't see any point in encumbering the record.

"The Court: The objection is overruled, you may proceed.

"Q. Continuing then, Mr. Mason, I will read that last question again that I read before the interruption.

'Question: Comply with Section 9(h) of the National Labor Relations Act as amended?

'Answer: Yes.

'Question: Is that your testimony?

'Answer: Yes.'

"Then there is a colloquy between counsel, if the Court please, and ladies and gentlemen, Mr. Broome, on page 115 which I will skip.

[fol. 355] "Page 116, after the hearing officer says, 'suggest we move along with the questioning.'

By Mr. Foley:

'Question: Mr. Mason, during the course of this Executive Board meeting, did you have a conversation with Mr. Travis?

'Answer: Yes, I did.

'Question: Do you recall the date on which you had it?

'Answer: Sometime during the meeting of the Executive Board.

'Question: You are referring to the meeting held during the dates of July 19 through July 22, 1949?

'Answer: Yes.

'Question: And where did you have this conversation?

'Answer: I do not recall whether it was at the headquarters of the union or at the hotel where we were meeting.

'Question: Where what?

'Answer: I believe it was during one of the—during the recess or after one of the afternoon sessions of the Board meeting, and I believe the location was the hotel.

'Question: What hotel?

'Answer: The Sherry Hotel.

'Question: Hotel Sherry. In what city?

'Answer: In Chicago, Illinois.

'Question: And where were the headquarters of the International Union at that time?

'Answer: They were in the downtown area of Chicago'.

"Now, Mr. Mason, without reading further, but I will if you still want your recollection refreshed, I will ask you whether that refreshes your recollection now—

"A. It does.

"Q. —that in the proceedings before the NLRB you testified that you had this conversation with Travis about his

resignation statement, his resignation from the Communist Party, that you testified that that conversation took place in Chicago, before the NLRB. Does that refresh your recollection?

"A. What is the question, please?

"Q. My question is whether your recollection is now refreshed that when you testified before the NLRB—

"A. Yes.

"Q. —you said you had that particular conversation with Travis in the City of Chicago in July, 1949. Is that right?

[fol. 356] "A. Yes.

"Q. And you will, I think, now recall, Mr. Mason, that I cross-examined you about that testimony before the NLRB. Do you recall that?

"A. Yes.

"Q. And I cross-examined you particularly with reference to the city, whether it was Chicago or Denver. Do you recall that?

"A. Yes.

"Q. Now, turning to your testimony on the Travis trials, do you recall that when you testified about this same conversation with Mr. Travis on the second trial of Travis that you then admitted, under my cross-examination, that when you gave that testimony before the NLRB you were mistaken about the city. Do you recall that?

"A. I explained that I was mistaken about the location of the discussion.

"Q. And you explained that when you testified against Travis on the second trial, is that right?

"A. I believe I did.

"Q. And in fact, isn't it true, Mr. Mason, that before you appeared on that trial you had advised the FBI that you had been mistaken in that testimony before the NLRB?

"Mr. Broome: Objection, Your Honor.

"The Court: Objection sustained.

"Mr. Witt: May I be heard on that, if the Court please?

"The Court: Yes.

"Mr. Witt: If the Court please, this is preliminary. Of course, there is no way of telling that from the question. If the witness says he doesn't recollect, I intend to impeach him by a copy of one of the statements handed to us under Section 3500 by the prosecution. And then I mean to go on from there with respect to other matters relating to the same incident, concerning which I think I can further impeach this witness.

"The Court: The objection is still sustained to the last question.

"Mr. Witt: Thank you, sir.

[fol. 357] "Q. Mr. Mason, you have stated on the witness stand on previous occasions, haven't you, that you have a poor memory for dates?

"A. I believe I do, yes.

"Q. You remember saying that when you were before the NLRB?

"Mr. Broome: Objection, Your Honor.

"The Court: The objection is overruled, he may answer.

"A. I didn't get the question.

"Mr. Witt: The reporter will read the question.

"(Question read.)

"A. I don't specifically recall, but I have said it on some occasion.

"Q. Mr. Mason, do you also have a poor memory as to cities where incidents took place in which you participated, as well as having a poor memory for dates?

"A. Only on the occasion when I leave home and have meetings in several cities on one trip, as in the instance that you were referring to.

"Q. And that instance at that time, your headquarters were Butte, Montana, weren't they?

"A. Yes.

"Q. Well, when you refer to that instance, are you referring to your trip to Denver, when you had this conversation with Travis.

"A. If I recall correctly, I attended meetings in three different places on that trip, and I on one occasion mixed up the cities as to where a certain conversation was held.

"Q. When you say you went to three different cities on that trip, are you still talking about the trip to Denver on which occasion you did have the conversation with Travis about his statement?

"A. During that trip I was at meetings in Denver, in Chicago and Leadville, Colorado.

"Q. That was the same trip?

"A. Same trip.

"Q. Can you fix the date when you left Butte? If you can't do it exactly, can you fix it approximately?

"A. No, I can't.

"Q. You say you went to Denver, Leadville and Chicago?

[fol. 358] "A. Yes.

"Q. Now this was in 1949, I think you said.

"A. I believe that's correct.

"Q. And will you tell us what month again, Mr. Mason, if you will?

"A. I can't recall at the moment.

"Q. Well, give us an idea if you can.

"A. Must have been in the midst of the summer. I am not qualified this morning to give you a specific date.

"Q. Well, you remember testifying yesterday about the Board meeting in Chicago in July, 1949?

"A. Yes.

"Q. You remember testifying to that yesterday?

"A. Yes.

"Q. And you remember you then went on to say that this discussion with Travis took place in Denver sometime thereafter, you remember that?

"A. Yes.

"Mr. Witt: Will Your Honor bear with me a moment?

"The Court: Yes.

"Q. Do you recall testifying yesterday that this conversation in Denver took place only a matter of a week or so

after the meeting of the Executive Board, in which decision was made to comply with the Tart-Hartley Law, do you remember that testimony of yours yesterday?

"A. I believe that is correct.

"Q. Do you remember the dates of the Board meeting in July in Chicago?

"A. I don't remember the dates.

"Mr. Witt: I am sorry, I don't have the exhibit number for this. Perhaps Mr. Broome can help me. I think the Government introduced copy of the minutes of the Board meeting, Executive Board meeting of Mine-Mill for July 19-22, 1949.

"Mr. Broome: I forget the number.

"Mr. Witt: If we show it to Mr. Broome perhaps we can agree that this is a copy of it.

[fol. 359] "Q. Mr. Mason, I show you Government Exhibit 11 and ask you to look at this and tell us whether it refreshes your recollection that the Executive Board meeting took place in Chicago during the period from July 19 to July 22, 1944.

"A. Yes.

"Q. So then when you testified yesterday that this conversation with Travis took place in Denver a week or so after that Board meeting, you were referring to a time late in July '49 or early in August '49, is that correct?

"A. I was referring to the fact that the conversation with Maurice Travis took place after this meeting of the Executive Board in Chicago. I don't recall giving any dates. I expressed an opinion that it was a week or so later.

"Q. Is that still your opinion today, Mr. Mason, the opinion you expressed yesterday?

"A. To the best of my knowledge, it is.

"Q. Mr. Mason, from time to time during the period from 1953 to 1955 you talked to agents of the FBI about Travis, didn't you?

"Mr. Broome: Objection, Your Honor.
"The Court: The objection is overruled.

"A. I believe I did.
"Q. And one of the agents you talked to was Agent Zola, wasn't it?
"A. Yes, I believe that is correct.
"Q. And that was in Butte, Montana, was it?
"A. It must have been.
"Q. Must have been because Agent Zola is stationed or was stationed in Butte?
"A. Also because I have not seen Mr. Zola at any other place.
"Q. Do you have any recollection of telling Mr. Zola in June of 1955 with respect to Mr. Travis that you were unable to give him information about dates or places in connection with what you told Mr. Zola about Mr. Travis?
"A. I don't recall that.

"(Defendant's Exhibit I was marked for identification.)

"Q. In view of that, Mr. Mason, I show you Defendant's Exhibit I, for identification, and direct your attention to this paragraph beginning at the bottom of page 6 and ask [fol. 360] you to read to the end of that paragraph, the top of page 7, read it to yourself and see if it doesn't refresh your recollection that you told Mr. Zola in June of 1955 that you were unable to give him dates or places about these incidents relating to Mr. Travis.

"The Witness: May I have the question?
"Mr. Witt: Will the reporter read it?

"(Question read.)

"A. Yes.

"Mr. Broome: May it please the Court, I suggest and move the Court that this exhibit be received in evidence because I think the Jury is entitled to see it and see the whole context of what it is that counsel is now interrogating the witness about. It is only fair to the witness.

"Mr. Witt: May I be heard, if the Court please?

"The Court: Well, there is no reason for you to be heard at this time. I am going to rule in your favor. If you want to say something—

"Mr. Witt: Only to make it clear, Your Honor, to save you the trouble I was going to read that particular paragraph. I think Mr. Broome is right with respect to that paragraph, at least.

"The Court: The objection will be overruled. The motion to admit it in evidence will be denied. You may go into the same document, however, on redirect.

"Mr. Witt: I will probably want to be heard at that time but as of now I would like to move the admission of this particular paragraph from this document, Defendant's Exhibit I, for identification.

"The Court: No. He has already answered the question. He has answered the question; there is no question before us.

"Mr. Witt: I am satisfied. I want to satisfy Mr. Broome. But if that does it, I will pass it. If Mr. Broome wants it read I will be glad to, and perhaps Your Honor would consider it.

[fol. 361] "Mr. Broome: If it please the Court, I believe if the Court will look at the document itself, at the particular paragraph that counsel is dealing with, the Court would recognize the necessity of having the Jury see just the context that this statement is made in.

"The Court: Do you mean the one paragraph or the whole instrument?

"Mr. Broome: The one paragraph and the whole instrument, too.

"The Court: Presently the question has been answered. We are ready for the next question, gentlemen. The record is made as far as the Court is concerned at this point.

"Mr. Witt: Thank you, sir.

"The Court: You may go into this matter on redirect.

"Mr. Broome: May it please the Court, I don't like to labor the question, but I would like to have the question

with respect to it read back at this time. I think it is important in seeing just the way the question was framed in respect to what appears in the paragraph.

"The Court: Read it to him.

"(Last question re-read by the reporter.)

"Mr. Broome: I renew my motion because counsel has misquoted the paragraph himself.

"The Court: Well, let me see it, gentlemen.

"Mr. Witt: I am ready to read the whole paragraph into the record and I think that will take care of it.

"The Court: Which paragraph are you talking about?

"Mr. Broome: Beginning at the bottom of page 6 and the top of page 7.

"The Court: The one paragraph is what you want read, is it?

[fol. 362] "Mr. Broome: Yes.

"The Court: Well, he offered to read it.

"Mr. Broome: All right.

"The Court: All right, Mr. Witt, would you now read it, please, that paragraph?

"Mr. Witt: I am tempted to re-argue the issue.

"The Court: Well, I will have him read it.

"Mr. Witt: No, I am not serious, of course.

"The Court: We will get it read if I have to read it myself.

"Mr. Witt: 'Mason advised that from the time of the 1946 IUMM&SW elections, Travis and he became more intimately acquainted. In all conversations Travis, probably out of respect to Mason's knowledge of the Union and the Party and its program, always spoke freely about his being a Party leader, a Party force in the Union, and the Party program in general. Mason states he is unable to enlarge on this information as to dates, places or specific individuals or incidents.'

"Q. Mr. Mason, did you have any conversations with Travis in the period immediately after the conversation you had with him in Denver about his statement resigning from the Communist Party?

"A. I don't quite get your question. If it is whether I had discussion with Travis after the discussion in which we discussed his resignation statement, the answer is yes.

"Q. Yes. All right, perhaps I should have made the question a little clearer. I will ask you whether in any of those discussions, after that occasion in Denver, you again discussed with him his statement resigning from the Party which was published in the Union paper.

"A. Again I can't understand your question.

"Mr. Witt: All right. I will ask the reporter to read it back to you.

"(Question read.)

[fol. 363] "A. Not specifically as a subject. I believe in one or two discussions he expressed regret and that he had made the mistake of publishing such a statement. I do not recall any discussion as to the contents of the resignation statement or the act itself as a specific subject.

"Q. On any of those occasions when you say Travis referred to it, did you express your opinion and did you tell him how you felt and how the membership in Montana felt about his statement?

"A. I don't recall any such discussion other than that at the time he showed me the resignation statement first.

"Q. In view of that I will ask you whether you have any recollection that you were asked questions about the subject and gave answers when you appeared in the NLRB proceeding.

"A. Very likely did. I can't recall.

"Q. Do you recall giving testimony before the NLRB that in one of these conversations subsequent to the one in Denver, that you said that the membership in your district was critical of the position he took and that many of them felt that he should have resigned his office in the Union, and not resigned from the Communist Party, do you remember giving testimony along those lines before the NLRB?

"Mr. Broome: May it please the Court, I object to this line. It is not cross of anything that was given on direct. The witness didn't testify to any such incidents here. I think it is improper for counsel to inquire as to this parcular line of testimony. It is not in explanation of anything he says. It is not a modification. It has no tendency to impeach. It shows no inconsistency. It is unimportant, but counsel is encumbering the record with a matter that I don't think he should be permitted to go into.

"The Court: The objection is overruled. You may answer, Mr. Mason.

"A. I don't recall. It would be difficult for me at times to recall specifically the testimony of yesterday. This testimony you are referring to happened years ago. I am sorry I don't recall it specifically.

"Q. Well, in view of that answer, Mr. Mason, do you remember your testimony yesterday about your conversation with Travis in Butte in late July or early August, 1953?

"A. Yes.

"Q. You didn't tell us yesterday, I think, about that conversation, that it took place in a bar or hotel in Butte?

[fol. 364] "A. I don't think I described the location.

"Q. No, but I am asking you not to tell us what you testified yesterday; from your present recollection where did that conversation in Butte take place, the one with Travis in the summer of 1953?

"A. At the Liggett Hotel bar.

"Q. Do you remember whether you identified the Liggett Hotel bar in your testimony yesterday about that conversation?

"A. I don't believe I did.

"Q. Do you remember in your testimony about that incident yesterday referring to any other person or persons who were present and then left before you had the conversation with Travis?

"A. I believe I said yesterday that there were two other people present the earlier part of the evening.

"Q. And who were those two other people present?

"A. Jack Clark and Ernest Salvas.

"Q. Do you recall giving testimony about that incident in that conversation on previous occasions when you have testified about Travis and Mine-Mill?

"A. With respect to the other people present?

"Q. Yes.

"A. I believe on one occasion I did say that there were other people present, but not during the conversation between Travis and myself. I believe on some occasion I testified that Travis said, 'Now that we've got rid of Clark, let's do some talking,' something of that sort.

"Q. Isn't that what you also said yesterday, Mr. Mason?

"A. It's possible.

"Q. Yesterday don't you recall you said that Salvas and Clark were both present, and then after they left, Travis said, or began the conversation by saying, 'Now that we have gotten rid of Clark' and then went on. You remember your testimony yesterday to that effect?

"A. Yes, I remember the testimony yesterday.

"Q. Can you explain why Travis didn't say, 'Now that we have gotten rid of Clark and Salvas'?

"Mr. Broome: Object to that, Your Honor.

"A. Yes, sir.

"The Court: He has already answered it.

[fol. 365] "Q. What's the answer, please?

"The Court: He said yes, sir, didn't he? What is the answer?

"Reporter: 'Yes, sir.'

"Q. Now, Mr. Mason, coming back to what I was asking about earlier—

"A. I didn't complete the answer.

"Q. Oh, I am sorry, Mr. Mason.

"Witness: Will you please read it?

"(Question read.)

"A. Shall I explain?

"Q. Yes. That is what I am asking you to do.

"A. Travis and I, Clark and Salvas met in the hotel room. We proceeded from the hotel room to the bar with the thought in mind that we wanted to talk over these things privately, without Clark being there, or Salvas being there. To the best of my knowledge Maurice Travis said that, 'Now that we have got rid of Clark, let's talk these things over.' I understood that to mean that you can't discuss Communist Party control of the Union in front of the President of the Union, who always pretended that he didn't know such a control existed.

"Q. Are you finished?

"A. Yes, sir.

"Q. I think I have already asked you whether you recall giving testimony about this occasion when you testified before against Travis and Mine-Mill. You have testified about this—

"A. Yes.

"Q. —occasion? Will you tell us in what proceedings you gave such testimony, among those you mentioned earlier.

"A. Well, the ones I am quite sure of, the occasions on which I testified, and I'm quite sure of testifying on the subject, was at the trial of Maurice Travis and at the retrial of Maurice Travis.

"Q. Do you remember any other occasion on which you gave testimony about this?

"A. Not at the moment.

"Q. In view of that answer, Mr. Mason, I will ask you whether you recall giving testimony about this incident when you appeared before the NLRB.

[fol. 366] "A. I believe I went through that a moment ago. I testified on that. I don't recall the testimony without refreshing my memory as to what's contained in the transcript of that hearing.

"Q. All right, in view of that, Mr. Mason, I will try to refresh your recollection by reading these questions and

answers from the NLRB transcript. This is page 174, or rather, bottom of page 173. I'm sorry.

'By Mr. Foley:

'Question: Do you recall when you had these conversations and meetings?

'Answer: I recall most clearly the most recent meetings and conversations with him, one on the occasion of his coming to Butte, Montana, last summer and one on the occasion of some meetings we have had in the City of Denver, Colorado, also about the same period.'

"Would that now refresh your recollection that Mr. Foley asked you about the conversation in Butte the preceding summer, the summer of 1953? Or do you want me to read more of your testimony?

"A. I think that establishes the fact, if that is the transcript of that hearing, that I had testified on the subject But as to refreshing my memory as to the testimony in that particular hearing, I would just have to study the transcript.

"Q. All right, continuing on page 174:

'Question: I refer you to the conversation and meeting you had with Mr. Travis in Butte, Montana, last summer and I ask you what you said and what he said. Was there one meeting—excuse me, I will ask a preliminary question. Was there one meeting or more than one meeting in Butte, Montana, last summer?

'Answer: There was one meeting in Butte.

'Question: Now, I repeat the question, what did you say and what did he say at that meeting in Butte, Montana?

'Answer: Mr. Travis came to Butte primarily to discuss peace terms between myself and my colleagues, who were protesting his and the Communist Party's domination of the Union.'

"Does that refresh your recollection now, that you gave testimony about that incident when you appeared before the NLRB?

"A. Yes.

"Q. All right, I will now ask you, going back to what I asked you earlier, whether you recollect whether, when you got to testify about that incident, you referred to either Mr. Clark or Mr. Salvas having been present earlier?

[fol. 367] "Mr. Broome: May it please the Court, I don't see the purpose of this. I don't see where it contradicts anything the witness has said here. It doesn't appear from that transcript, or that part of it which counsel read, that it was even asked who was present at the conversation. I don't see what the purpose of this is. Seems to me it confirms what he said before.

"The Court: The objection is sustained.

"Q. All right. Mr. Mason, I think you have testified earlier that you gave testimony about this incident on both Travis trials, is that right?

"A. Yes.

"Q. Do you remember whether you mentioned Mr. Clark or Mr. Salvas, or both, when you testified on the first Travis trial?

"Mr. Broome: If the Court please, I object to that. Counsel has a record, I think he could show it, or read his question. It seems to me it puts an undue strain and unfair strain on the memory of the witness who does not have the transcript before him.

"Mr. Witt: All right, I will go along with that, if the Court please. I think we can save time.

"The Court: All right.

"Q. All right, Mr. Mason, I will ask you, do you remember the following questions and answers when you testified in the first Travis trial, and see whether that refreshes your recollection.

"Mr. Witt: Page, first Travis trial, Mr. Broome, page 616.

'Question: Did Mr. Travis subsequently come to Butte?

'Answer: Yes.

'Question: About how long after you had this telephone conversation with him?

'Answer: It was a matter of a few days.

'Question: Now, did you have a conversation with him at that time?

'Answer: Yes.

'Question: Would you tell us where?

'Answer: In the Hotel Liggett bar, at a table in the rear.

'Question: Was anyone else present at the time you had this conversation with Mr. Travis?

[fol. 368] 'Answer: There were a couple of clients in the establishment at the front of the bar.

'Question: They didn't participate in the conversation?

'Answer: No.

'Question: Now, would you please relate the substance of that conversation as you now recall it, and as well as you can would you indicate who said what?

'Answer: Travis said that now that we have gotten away from Clark, we can get down to the real problem.

* * * * * * *

[fol. 392]

RENEWAL OF MOTIONS ON FIRST TRIAL, AFTER CROSS-EXAMINATION, TO PRODUCE GRAND JURY TESTIMONY OF MASON VOIR DIRE, COLLOQUY AND RULING

"Mr. Witt: If the Court please, that completes the cross-examination of this witness for the present, subject to our motion with respect to his Grand Jury testimony which we understand Your Honor prefers to hear outside the presence of the Jury or in Chambers."

At The Bench

Mr. Witt: If the Court please, that was all for the jury, as you will have noted, and then we held this hearing, 3500 hearing, what I call the Grand Jury hearing in the court-room outside of the presence of the jury. So it occurred

to me before we complete the record Your Honor might want to let the jury go now because it is quite clear there will be nothing else for the jury this afternoon. Whatever you please to complete the record.

Mr. Broome: I believe there is a little short redirect. I was looking for it.

[fol. 393] The Court: There is some redirect.

Mr. Broome: On page 1505. That is where I first mentioned it. It starts on 1514.

The Court: They offered an exhibit.

Mr. Witt: Yes, that's all, not redirect. I don't find any redirect in the printed record.

The Court: Mason was on the stand. I don't think there is any redirect.

Mr. Witt: Does Mr. Broome want to read that to the jury?

Mr. Broome: No, I don't think it is necessary. I thought it was redirect. Exhibit 14.

The Court: You asked permission to read it.

Mr. Broome: What I read appears at the top of page 1515. I could just read that part of it only.

The Court: Do you want that in the record?

Mr. Broome: Yes, I would.

The Court: Let's let him read that into the record.

Mr. Taylor: Is that an exhibit that has already been admitted in this trial?

Mr. Broome: It has not. I haven't offered it as yet.

Mr. Taylor: You are going to mark it? You will have to do that first.

Mr. Witt: May we go off the record for a moment? I have a suggestion I don't think needs to be on the record.

(Discussion off the record.)

The Court: Just read this into the record.

[fol. 394] Mr. Taylor: Does this require an offer?

The Court: No, I don't think so.

In Open Court

Mr. Broome: May it please the Court?

The Court: Mr. Broome.

Mr. Broome: Ladies and gentlemen of the jury, this was a short redirect.

"The Court: All right, Mr. Broome, you may proceed.

"Mr. Broome: May the record show that Government's Exhibit Number 14 is received in evidence?

"The Court: Yes.

"(Government's Exhibit Number 14, for identification, was received in evidence.)

"Mr. Broome: May I have permission of the Court to read a part of this?

"The Court: I received that part of it that pertains to a specific meeting. You may read that part of it, yes.

"Mr. Broome: 'Minutes of the International Executive Board meeting, International Union of Mine, Mill and Smelter Workers, Hotel Sherry, Chicago, Illinois, April 5 to April 7, 1950. Wednesday, April 3, 1950, Afternoon Session', listing the Board Members present. 'Also present at the Executive Board Meeting was Al Skinner' and some others."

That concludes the reading.

The Court: As I understand, gentlemen, this completes the testimony of Mr. Mason?

Mr. Broome: That's right.

* * * * * * *

[fol. 395] (Whereupon, the jury panel withdrew from the courtroom.)

The Court: All right, gentlemen, now, do we want to complete our record with reference to the Grand Jury request in connection with Mason's testimony?

Mr. Witt: Yes, if the Court please, I will indicate to the reporter from the printed record on appeal, on page 537, after the completion of my cross examination of Mason, to

page 550, to the point on that page where we went into session in open court before the jury.

The Court: All right, that will be incorporated then in the record. Is that understood, Mr. Broome?

(Counsel conferred.)

The Court: All right, this is going to be made a part of the record in this case.

Mr. Broome: How's that?

The Court: This that transpired outside of the presence of the jury at the other proceeding is going to be made a part of the record in this case.

Mr. Broome: Yes, I think that's quite proper.

The Court: All right.

Reporter's Note

(The following excerpted portion of the official transcript of the previous trial, pages 1494 through 1514, was not read to the jury. At the direction of Court and counsel, this portion is being inserted at this point in this record.)

"By Mr. Witt:

"Q. Mr. Mason, you told us this morning that you had testified before Grand Juries here in Denver in 1954 and 1956. Do you remember that?

"A. Yes.

"Q. 1954 with respect to Travis, and in 1956 with respect to this case, is that right?

[fol. 396] "A. I believe so.

"Q. I now ask you a number of questions with respect to your testimony before each of those Grand Juries, Mr. Mason.

"Mr. Broome: If it please the Court, there isn't any question about the fact that Mr. Mason did testify before the Grand Jury. The Government concedes that in both of those cases, and objects to any interrogation with respect to it.

"Mr. Witt: This is to make our record for renewal of our demand for the Grand Jury testimony.

"The Court: All right, I think they can make their record on it. You may proceed, Mr. Witt.

"Q. Mr. Mason, you recall that you testified yesterday about the Board meeting of the Mine-Mill in April, 1948, in Chicago? Do you remember giving testimony about that occasion?

"A. Yes.

"Q. Did you give testimony about that same Board meeting when you testified before the Grand Jury in 1954?

"A. I'm not certain, but I believe I did.

"Q. Did you give testimony about the same occasion, I am still talking about this Executive Board meeting in April, 1948, when you testified before the Grand Jury in 1956?

"A. Again I am not certain, but I believe I did.

"Q. Do you remember testifying yesterday that was the occasion when you had a conversation with Travis?

"A. With Travis and with Eckert, as I recall, unless we are talking about two different meetings.

"Q. All right, sir, I think you are right, Mr. Mason. We are talking about the same thing. Did you testify about that conversation with Travis and Eckert when you testified before the Grand Jury in 1954?

"A. I can't recall, but I believe I did.

"Q. I'll ask you the same question about that conversation with respect to your testimony in 1956 before the Grand Jury.

"A. I thought I answered it. I can't recall, but I do believe I did.

"Q. Mr. Mason, you recall testifying yesterday about the conversation you had with Travis in Denver in 1948 after the Board meeting in Chicago in July, 1948?

"A. Yes.

[fol. 397] "Q. I will ask you with respect to that conversation whether you gave testimony about it before the Grand Jury in 1954?

"A. Yes, I believe I did.

"Q. All right, the same question about the Grand Jury in 1956, did you give—

"A. Again I think I did.

"Q. Mr. Mason, you remember testifying yesterday about the Board meeting in Chicago in July of 1953?

"A. Yes.

"Q. Did you testify about that when you appeared before the Grand Jury in 1954?

"A. I cannot recall, but I—I believe I did.

"Mr. Broome: Mr. Mason, you have me confused on this last question. A Board meeting in 1953?

"Mr. Witt: You may be right, Mr. Broome. I wondered about that when I asked the question. May I have a moment to check?

"The Court: Yes.

"Mr. Broome: I don't recall he gave any testimony about that.

"Mr. Witt: You may be right. My notes show, I may be mistaken. I have the pagination, if the Court please, it will only take me a moment. Oh, yes. May I start again and withdraw my questions and strike the witness's answers with regard to that Board meeting in July, 1953. That was the Board meeting in 1949.

"The Court: Is it satisfactory to you that the witness's answer be stricken?

"Mr. Broome: Yes, it is.

"The Court: All right, it will be stricken.

"Mr. Witt: That is pages, if the Court please and Mr. Broome, 1253, following.

"Q. All right, I will go back, Mr. Mason, and ask you these questions about your testimony yesterday concerning the Executive Board meeting in Chicago in July, 1949, and ask you whether you gave testimony about that before the Grand Jury in 1954?

"A. I believe that I did.

[fol. 398] "Q. And in 1956 before the Grand Jury?

"A. Also.

"Q. Now, Mr. Mason, perhaps we can shorten this if I ask you about all the other incidents and conversation,

meetings, etc., you testified to yesterday, whether you gave testimony about those matters before the Grand Jury in 1954 and 1956, would your answer be the same, that you believe you did?

"Mr. Broome: May it please the Court, I think that is somewhat of an unfair way to get at it.

"Mr. Witt: All right, if it's unfair, I will take the few extra minutes.

"The Court: All right.

"Mr. Witt: I thought we would save a few minutes.

"Mr. Broome: I am all in favor of saving time, but I do think that shotgun approach is not quite fair to the witness.

"Mr. Witt: Well, we are not saving time. I will do it the way Mr. Broome suggests. We are losing time if we continue to argue about it.

"Q. Mr. Mason, do you remember your testimony yesterday about the conversation with Mr. Travis at his home in Chicago?

"A. Yes.

"Q. Before the July, 1949, Board meeting? Do you remember that?

"A. Yes.

"Q. If I ask you whether you testified about that conversation before the Grand Jury in 1954 and 1956, what would your answer be?

"A. I would say that I believe I did.

"Q. And would your answer be the same, that you believe you did, with respect to the conversation you had with Travis in Denver concerning his statement about his resignation from the Communist Party?

"A. Yes.

"Q. You believe you testified about that matter in 1954 and 1956 before the Grand Jury?

"A. Yes.

"Q. You remember your conversation yesterday about your discussion with Al Skinner in Chicago in the very early part of 1950, do you remember that yesterday?

[fol. 399] "A. Yes.

"Q. Did you testify about that incident before the Grand Jury in '54?

"A. I'm not certain about that.

"Q. And you also wouldn't be certain then whether you testified about that incident before the Grand Jury in 1956?

"A. I cannot recall. I probably did.

"Q. You make a distinction between your testimony in 1954 and 1956?

"A. I am stating that I can't recall testifying on this subject before the Grand Jury in 1956, but that I probably did.

"Q. And—I'm sorry, Mr. Mason, if I am not clear. What about the Grand Jury in '54?

"A. I'm not certain about that at all.

"Q. Are you uncertain about whether you testified about that incident before the Grand Jury because you had some feeling today that you were mistaken about that—

"A. No.

"Q. —on direct yesterday?

"A. No, it's a question of memory with me. Some things I remember, others I do not. Some things I remember today and won't remember tomorrow and vice versa, just a human ailment. I think it's quite common.

"Q. And you suffer from that?

"A. I think you do, too.

"Q. I asked you whether you did, Mr. Mason.

"A. To a degree.

"Q. All right, I'll ask you about the testimony yesterday concerning your conversation with Charles Wilson in St. Louis at the 1953 convention. Do you remember that yesterday?

"A. Yes, sir.

"Q. Did you give testimony about that conversation when you appeared before the Grand Jury in '54?

"A. I'm not sure about that.

"Q. And would your answer be the same if I asked you whether you testified about that incident before the Grand Jury in 1956?

"A. Same, except I do believe that I did.

"Q. Then you believe that you did in 1956 but you are not sure about 1954, is that correct?

"A. I am not sure about 1954.

"Q. Now I'll ask you, Mr. Mason, whether when you appeared before the Grand Jury in 1954 you gave testimony about the defendant Travis?

"A. Yes.

[fol. 400] "Q. And did you give testimony about the defendant Travis before the Grand Jury in 1956?

"A. Yes, I believe I did.

"Q. I will ask you the same question about the defendant Dennis.

"Mr. Broome: May it please the Court, this is repetitious. I obect to it, it is repetitious, he has asked him already if he gave testimony about these various incidents and they show on their face it involved Mr. Travis from time to time. It seems to me it is repetitious.

"The Court: The objection is now sustained. I think you have gone into this matter far enough, unless you have other specific incidents.

"Mr. Witt: I do want to ask, if the Court please—Mr. Broome may be right about the defendant Travis—then I will ask him generally, to save time, because the problem is different then with respect to the specific incidents.

"Q. Which of the other ten defendants here on trial, I will ask you, Mr. Mason, did you give testimony about before the Grand Jury in 1954?

"Mr. Broome: Object to that, Your Honor. I think that's immaterial. He has testified to certain instances here and I think that's all that is involved in the case, and the record speaks for itself as to who is involved in the various items of testimony he gave.

"The Court: Objection sustained.

"Mr. Witt: All right, so as to make the record, if the Court please, I will ask Mr. Mason the same question about his testimony before the Grand Jury in 1956.

"Mr. Broome: Same objection—

"Mr. Witt: Just so as to be clear to Mr. Mason, that is, he said he testified before the Grand Jury in 1956, he gave testimony about all the defendants on trial except the defendant Travis.

"Mr. Broome: Same objection.

[fol. 401] "The Court: Same ruling, sustained.

"Mr. Witt: Thank you, Your Honor. That completes the record we wish to make to support the motion I am about to make with respect to the production of this man's Grand Jury testimony in 1954 and 1956.

"At this time, if the Court please, we make the same motion in the 4 alternatives that we have made in the case of the other witnesses who have testified before one or more Grand Juries.

"The Court: Each of the motions will be denied on the same grounds that the others were.

* * * * * * *

[fol. 425] Bobby G. Fikes, called as a witness by the Government, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Broome:

Q. Will you state your name, please, sir?
A. Bobby G. Fikes.
Q. And where do you live, Mr. Fikes?
A. In the Los Angeles area.
A. And how old are you?
A. I am thirty-six.
Q. Will you tell us, please, sir, what your occupation is?
A. I am an expediter.
Q. I didn't—
A. An expediter.
Q. For whom do you work?
A. North American Aviation Company.
Q. What is an expediter?
A. You expedite component products for aircraft and missiles.

Q. And are you married?
A. Yes, sir.
Q. Have any children?
A. Yes, sir.
Q. How many?
A. Three.
Q. How long have you lived in California?
A. Since 1957.
Q. And what was your residence prior to that time?
A. The Birmingham, Alabama area.
Q. And how long had you lived in Alabama?
A. Well, practically all my life. I was born there in Alabama.
Q. Were you ever in the Army, Mr. Fikes?
A. Yes, sir.
Q. When did you go in the Army?
A. In the first part of 1951.
Q. How long did you stay in the Army?
A. Approximately two months.
Q. And were you discharged?
A. Yes, sir.
Q. And what sort of a discharge was it?
A. Medical discharge.
Q. And do you mind telling us what the medical discharge was about?
A. For a duodenal ulcer.
Q. And while you were in the Army for those two months, what was the condition of your duodenal ulcer?
A. Well, I spent most of my Army time in the hospital.
Q. All right, sir. Mr. Fikes, were you ever a member of the Communist Party?
A. Yes, sir.
Q. And do you recall when you first joined the Communist Party?
A. It was in 1948.
Q. Do you remember where it was?
A. In New Orleans.
[fol. 426] Q. And how long approximately, if you can recall, did you remain in the Communist Party?
A. Is that the first time you mean?

Q. Yes, on the occasion after you joined in 1948, how long did you then remain in the Communist Party, if you prefer to call it a first time?

A. Well, up until 1951.

Q. All right, and at about the time you went into the Army?

A. Yes, sir.

Q. Now, at any later date, did you again become a member of the Communist Party?

A. Yes, sir.

Q. And when was that, please, sir?

A. Well, actually, when I got in was in 19—well, I just started trying to get in in 1953, but it was actually 1954 when I got back in.

Q. Well, now, will you tell us, please, sir, the circumstances under which you joined the Communist Party on this second occasion?

A. That was due to—I was contacted by the F.B.I., and they asked me to get back in, and I agreed.

Q. Will you describe your relations with the F.B.I. at that time and subsequently after you did get in?

A. Yes, I made reports to them and cooperated with them.

Q. All right, sir, and how long did you remain in the Communist Party on the second occasion?

A. Up until I testified in Denver.

Q. Do you remember what year that was?

A. That was in 1959, to the best of my memory.

Q. Do you remember what time of the year it was?

A. It was cold weather. I don't know, could have been the winter time.

Q. All right, sir, now, during this second tenure in the Communist Party, were you at successive times located in different places?

A. Yes, sir.

Q. And where were you first located? When you first became a member of the Communist Party on this second occasion, where were you then?

A. Alabama.

Q. What particular place?

A. In Bessemer.

Q. And did you subsequently become a member of the Party at some other occasion?

A. Yes, sir.

Q. And where was that?

A. In California.

Q. That's after you moved to California?

A. Yes.

Q. All right, sir. Mr. Fikes, do you know a man by the name of Charles H. Wilson?

A. Yes, sir.

[fol. 427] Q. Do you see him in this court room?

A. Yes, sir.

Q. Will you please point him out?

A. He is the fourth one over from my right.

Mr. Broome: May the record show that the witness has identified the defendant, Charles H. Wilson?

The Court: All right.

Q. Do you recall when you first met Mr. Charles H. Wilson?

A. Yes, sir.

Q. What was the answer?

A. Yes, sir.

Q. Please keep your voice up. Sometimes I can't hear you and I am afraid maybe the jury can't hear you either. Do you remember where it was you met him?

A. It was at the Union Hall in Bessemer, Alabama.

Q. And when was it, please, sir?

A. It was in 1948.

Q. And what was the occasion?

A. I was a member at that time of the Marine Cooks and Stewards Union, and we were on strike and I went there to ask for his union to donate for the strike fund.

Q. And did you get such a donation?

A. Well, I didn't go to pick it up personally, I think later they possibly sent something to the strike fund.

Q. Now, Mr. Fikes, when was the next occasion that you met Mr. Charles H. Wilson?

A. That was in 1949.

Q. Do you remember what time of the year it was?

A. Well, it could possibly have been early summer, there, of 1949. I don't remember.

Q. Is there any particular happening or event that you can relate it to that would help you to fix the time?

A. Well, sir, it was right after the Mine-Mill Smelter Workers had lost the locals.

Q. Where did you meet with Mr. Wilson on this second occasion?

A. In the Union Hall.

Q. Is that in Bessemer?

A. Yes.

Q. Did you have a conversation with him?

A. Yes, sir.

Q. Who was present at the conversation?

A. Charlie Wilson and I.

Q. Now, tell us as nearly as you can recall at this time just what that conversation was, and by that I mean what you said to him and what he said to you.

[fol. 428] A. Well, I told him that I had been transferred out of the waterfront section of the Communist Party there, and into the steel section, and that the Party had sent me down there to work and try to get into one of the locals that the Mine-Mill had lost, and to try to win it back for Mine-Mill.

Q. Now, tell us what, if you can recall, Mr. Wilson said.

A. Well, he said that he had been expecting me there, he knew I was coming, and that he was glad that I had come down there to work, that they needed people.

Q. Was anything said with respect to how you were going to get the job in one of these locals?

A. No. He explained there was nothing that the Mine-Mill could do for me to get a job, that I would have to be on my own, I would have to go there and put in an application and get a job on my own.

Q. All right. Now, was there anything else in that conversation that you recall at this time?

A. Well, I asked him about using an alias, if I should use my right name there. He told me definitely I should, that the Party had sent one guy down before and that they had had trouble over it.

Mr. Taylor: Excuse me. I don't think the answer is clear. "Should use" or "should not use" it?

Mr. Broome: I will ask him.

By Mr. Broome:

Q. Will you repeat it, please? I believe you said Wilson said you should use it?

A. Should not use the alias, definitely not.

Mr. Taylor: Mr. Broome, are you finished with that conversation with this particular episode?

Mr. Broome: Yes.

Mr. Taylor: Your Honor, would Your Honor give the cautionary instruction with respect to the use of this testimony by the jury?

The Court: Ladies and gentlemen of the jury, the testimony you have just received from this witness concerning an alleged conversation with the defendant Wilson in Bessemer, Alabama, in 1959, may be considered by you in connection with the case of United States against the de- [fol. 429] fendant Charles H. Wilson and should not be considered by you in any manner or to any degree in connection with the case the United States against the other defendants in this case.

Mr. Broome: May it please the Court?

By Mr. Broome:

Q. Mr. Fikes, after you came to Birmingham at that time, did you become a member of any particular Communist Party organization?

A. Yes, sir.

Q. What was the name of that organization, please, sir, if you can recall?

A. The William E. Foster Steel Club.

Mr. Taylor: Mr. Broome, I don't want to intrude unnecessarily, but could we have the time made a little more specific on that?

Mr. Broome: Well, all right.

By Mr. Broome:

Q. Tell us, if you can recall, when you became a member of the Foster Steel Club, and how long your membership continued in it?

A. Well, the club was organized in 1949 there, in the summer, to the best of my knowledge or memory, and then it existed up until Birmingham passed an ordinance that all Communists must register, and then I went to New York and the district organizer went to New York, and, so far as I know, it dissolved then.

Q. About when was this ordinance passed, or, about when, let us say, did you go to New York on account of the ordinance having been passed in Birmingham?

A. 1950.

Q. Can you remember what time in 1950?

A. No, I don't.

Q. Now, Mr. Fikes, did you have any familiarity with this phase of the Taft-Hartley Act which required the filing of non-Communist affidavits?

A. Yes, sir.

Q. You have heard it discussed?

A. Yes, sir.

Q. Did you ever hear it discussed in the office of the International Union of Mine, Mill and Smelter Workers in Bessemer?

A. Yes, sir.

Q. Do you recall, please, sir, about when it was that you heard this discussed?

A. It was in the summer of 1949.

Q. Is that the best you can do?

A. Yes.

Q. By way of fixing the time?

A. Yes, sir. It was, I'm almost sure, in the summer time of 1949. That's the best I can do.

[fol. 430] Q. Now, keep your voice up, please, sir. Now, can you recall who was present at this discussion?

A. Yes, sir. There was Howard Mooney and Alton Lawrence, Charlie Wilson, and Paul Rosenbloom, Oscar Burland, and myself. And there was another man right in the next room.

Q. Do you know whether at that time, to your knowledge, Charles H. Wilson held any office in the International Union of Mine, Mill and Smelter Workers?

A. Yes, he was a Board Member for District 5.

Q. Board Member for what—District 5?

A. Yes, sir.

Q. All right, sir. Now, you mentioned a man by the name of Al Lawrence. Do you know whether he held any office or employment in the International Union of Mine, Mill, Smelter Workers?

A. Yes, he was an International rep.

Q. An international what?

A. International Representative.

Q. Yes. Do you know where he was assigned, where his post of duty was?

A. In District 5.

Q. District 5. Was he on Charles Wilson's staff?

A. Yes, sir.

Q. You mentioned a man by the name of Mooney. What was his first name, please?

A. Howard Mooney.

Q. Howard Mooney. Do you know whether he had held any office or employment in the International Union of Mine, Mill, Smelter Workers?

A. Yes, sir, he was educational director, I believe, at that time.

Q. Educational director for what?

A. The Mine, Mill, Smelter Workers Union.

Q. Confined to any particular district?

A. District 5.

Q. All right, sir. Now, do you recall whether or not there was any functionary of the Communist Party present at this meeting?

A. Yes, sir.

Q. What was his name?

A. Jose Hudson.

Q. Was he present at this meeting?

A. Yes, sir.

Q. When you refer to him as a Communist Party functionary, will you please explain what you mean by that?

A. That was his job, working—I don't know what his official title was, however he was on the payroll of the Communist Party.

Q. All right, sir. You mentioned a man by the name of Paul Rosenbloom. Did he have any employment or office, to your knowledge, in the International Union of Mine, Mill and Smelter Workers?

A. He was a member of the William E. Foster Steel Club.

[fol. 431] Mr. Taylor: I move to strike the answer as not responsive, Your Honor. The question was whether he held an office in the—

The Court: The motion will be granted. The answer will be stricken. Ladies and gentlemen of the jury, you are instructed to disregard it; it was not responsive to the question.

Do you understand the question, Mr. Fikes?

Mr. Broome: I asked—pardon me, Your Honor.

The Court: You may re-ask it.

By Mr. Broome:

Q. I asked if to your knowledge was he employed by the International Union of Mine, Mill, Smelter Workers?

A. No, he was not.

Q. To your knowledge was he a member of any Communist Party organization in the Bessemer or Birmingham, Alabama area?

A. Yes, sir, he was a member of the William E. Foster Steel Club.

Q. Was this gentleman you mentioned by the name of Jose Hudson—do you know whether he held any employment with the International Union of Mine, Mill and Smelter Workers?

A. No.

Q. Were you employed by the International Union of Mine, Mill and Smelter Workers at that time?

A. No, sir.

Q. At that time were you a member of this Foster Steel Club?

A. Yes.

Q. Now, Mr. Fikes—

Mr. Taylor: Excuse me. I didn't hear the answer to the first of these questions. Did the witness say "yes" or "no?"

The Court: He said "no."

By Mr. Broome:

Q. Was there any discussion at this meeting, Mr. Fikes?

A. Yes, sir.

Q. Do you remember any of the persons who participated in the discussions?

A. Well, Jose Hudson participated, and Charlie Wilson, Alton Lawrence and Howard Mooney. I'm sure everybody participated. I remember those from some of the things that were said.

Q. How long did this meeting go on, if you can recall?

A. Oh, I would say a couple of hours, approximately.

[fol. 432] Q. All right, sir. Now, will you tell us, Mr. Fikes, as nearly as you can recall, what Mr. Hudson, Jose Hudson, had to say?

A. He said that the decision had been made by the Party that officials of the union were to comply with the Taft-Hartley law.

Q. Did he say what union?

A. Well, he was talking about the Mine, Mill and Smelter Workers union there, but—

Q. All right.

A. So, he said that they would sign a letter of resignation to the Party, and that they would see that this got into New York—the letter of resignation from the Party. But they would continue—that this would be on paper, only, a piece of paper—and that they would continue to read the Party press, give donations and it was of utmost—it should be utmost in everybody's mind that the security was the most important thing at this time, because they had to sign this letter of resignation from the Party and was supposed to be out where they could sign the affidavit.

Q. Now, do you remember anything that Mr. Charles H. Wilson had to say?

A. Yes, he said that he had been to a Board meeting, and also met with Party people, and that he was opposed to signing the affidavit on principle, but something had to be done. They had to do something to save the union. And so therefore he went along with this, that they should resign, write a letter of resignation and should sign the affidavit.

Q. Now, do you recall anything else that Mr. Wilson had to say?

A. Also, he spoke of a liaison—

Mr. Taylor: A what?

The Witness: A liaison.

Mr. Broome: "Liaison", you might call it, Mr. Taylor.

By Mr. Broome:

Q. Is that what you mean?

A. Yes, sir.

Q. What did he say about liaison?

A. He said it would be set up on a national level with the officials of the union and with the Party, that they would have liaison with the national officials of the union.

Q. Anything further in that connection with Mr. Wilson? [fol. 433] A. Not that I recall right now, but there was more conversation, I just—

Q. All right. Now, on this question of liaison, did anyone else in the room discuss that phase?

A. Jose Hudson then said that the liaison between the national office was good, however, that it needed also to be set up on a local level to handle local problems, and that he certainly couldn't see every time a problem would come up to have to go to the national office with it, that there was competent people locally that would handle the problems locally.

Q. All right. Now, you mentioned that Mr. Alton Lawrence had something to say and participated in this discussion. Can you tell us as nearly as you can recall what Mr. Lawrence had to say?

A. He said he was opposed to any kind of liaison, that he certainly didn't go along with that, and he said, "What if the Government got somebody in there as a liaison that was a stooge," I think was the word, "for the Government!" He said, "We'd all be in jail."

By Mr. Broome:

Q. Do you recall whether there was any response to that remark of Mr. Lawrence by any person in the room?

A. Howard Mooney also spoke that he was—even though that he didn't have to sign an affidavit, that he was opposed to signing it.

Q. Is that all you can remember about this meeting, Mr. Fikes? Anything else you can recall about it?

A. No, I can't. There was more said.

Mr. Taylor: May we have the cautionary instruction, please, Your Honor?

The Court: Ladies and gentlemen of the jury, the evidence that you have just heard from this witness concerning an alleged meeting at the Union Hall in Bessemer, you are specifically instructed that the statements purportedly made by the witness Wilson can only be considered in the case against Mr. Wilson and not in the case against the other defendants, and you are further instructed that the statements made by persons identified as Hudson, Mooney and Lawrence should not be considered as evidence against the defendant Wilson unless you find from the evidence that Mr. Wilson assented to such statements or adopted them, and, of course, they should not be considered as evidence against the remaining six defendants.

[fol. 434] Mr. Broome: May it please the Court.

By Mr. Broome:

Q. Mr. Fikes, did there come a time when there was a change in the personnnel of the officers in the International Union of Mine, Mill and Smelter Workers that affected Mr. Wilson?

A. Yes.

Q. Do you know what that change was?

A. He became Eastern Vice President, and Alton Lawrence became Board Member.

Q. Do you remember when this was, Mr. Fikes?

A. No, sir, not exactly.

Q. Do you have any idea or impression of what year it may have been?

A. I don't know. It could have been in 1950, or it could have been as late as 1951, I just don't remember.

Q. Do you recall whether it happened while you were still in Birmingham and before you made the trip to New York you told us about earlier?

A. I believe it did.

Q. Before?

A. Yes, sir.

Q. All right, now, you spoke about the mention of a letter of resignation from the Party. Did you ever see one of these letters of resignation written by any of the officials, any one of the officials of the International Union of Mine, Mill and Smelter Workers?

A. Yes, sir.

Q. And whose letter is that, sir?

A. Alton Lawrence.

Q. Did you have the letter in your possession?

A. Yes, sir.

Q. For some purpose?

A. It was given to me to give to Sam Hall in Birmingham.

Q. Who was Sam Hall?

A. He was the District Organizer for the Communist Party in Alabama.

Q. In Alabama? All right, sir. Now,—

[fol. 435] Mr. Taylor: May we have that specified as to time, please?

Q. Yes, will you please as nearly as you can tell us when that happened that you had this letter in your possession?

A. I would say it was late '49. It could have been—

Q. Is there any particular event or incident—

Mr. Taylor: It seems to me he answered the question. He answered that he thought it was late '49.

Q. Are you certain that's when it was?

A. No, sir.

Q. Is there any event or happening that you could relate to that would help you to fix the time?

A. It was after—wait a minute, now, that '49 is wrong, because it was after the change had taken over in the Mine-Mill and Alton Lawrence was a Board Member already, so that must have been in '54, in 1954 when Alton Lawrence took over as Board Member for District 5.

Q. You think that was in 1954, when Alton—

Mr. Taylor: You ask the question, the witness has answered the question, and I object to counsel's pursuing it unduly after that.

Mr. Broome: All right.

Q. I believe you stated now, Mr. Fikes, that some time that year of 1950 you went to New York.

A. Yes.

Q. And about how long did you remain in New York?

A. Well, I remained there until right before I went into the Army in 1951, and, pardon me, 1951, the first, somewhere around March.

Q. Now, while you were in New York during this period from sometime in 1950 to the time you went to the Army, did you have occasion to see Mr. Charles H. Wilson in New York City?

A. Yes, sir.

Q. Can you fix the time, please, sir, that you saw him in New York City?

A. The best I can do there is between the time I went there in 1950 at Christmas. It would be probably in that period. I don't remember that.

Q. Well, was it warm weather or cold weather?

A. No, it wasn't real cold weather, to the best of my memory.

[fol. 436] Mr. Taylor: Did the witness say it was not?

Mr. Broome: Yes.

The Witness: It was not.

Q. Is that the best you can do by way of fixing a time?

A. Yes.

Q. Now, while Mr. Charles H. Wilson was in New York City, did you have occasion to meet with a man by the name of Albert Pezzati?

A. Yes, sir.

Q. And how did it come about that you met Mr. Pezzati?

A. Well, I met Charles Wilson in his hotel room and he took me up to the Union Hall in New York and introduced me to Al Pezzati.

Q. Now, can you tell us what, as nearly as you can recall, he said by way of introducing you to Mr. Pezzati?

A. He introduced me and said, "This is one—a party member that is a native southerner and he has been down there working in Alabama until he had to leave and come to New York."

Q. Do you remember anything Mr. Pezzati said?

A. No, he said he was glad to meet me and so on. It was a short conversation. I don't remember what it was.

Mr. Broome: All right, sir.

Mr. Taylor: May we have the cautionary instructions, please, Your Honor?

The Court: You mean about being introduced to Pezzati? Is this—

Mr. Taylor: Well, the witness' testimony, as I understand it, involved comments made by Wilson in introducing the witness to Pezzati. The alleged comments of Wilson, that's what we wish the cautionary with respect to.

The Court: All right. Ladies and gentlemen, with reference to the conversation between Mr. Wilson and the witness on the witness stand here in a hotel room or union hall in New York in late 1950, as to which this witness just testified, you are specifically instructed any statements made by Mr. Wilson at that time and place should be considered

by you only in the case against Mr. Wilson and not in the case against any other defendants.

[fol. 437] All right, Mr. Broome.

Mr. Broome: May it please the Court.

By Mr. Broome:

Q. Mr. Fikes, you spoke earlier about rejoining the Communist Party at a later date by way of your cooperation with the Federal Bureau of Investigation. Will you tell us, please, sir, how long it took you to get back in the Party, if you remember, please, sir?

A. Quite a few months.

Q. And do you recall when you commenced your—or, about when you commenced your effort to get back in?

A. It was the summer of 1953.

Q. And when was it approximately that you finally made it and became a member of the Party?

A. It was in the first part of 1954.

Q. All right, now during this period of time that you are making these efforts to get back in the Communist Party, did you have any conversation with Charles H. Wilson?

A. Yes, sir.

Q. And will you please tell us as nearly as you can recall when the conversation was?

A. Oh, it was in possibly the first part of 1954.

Q. All right, is that the best you can do for us?

A. Yes.

Q. Where was the conversation?

A. At his home in Bessemer.

Q. And who was present at the conversation?

A. Charles Wilson, his wife and myself.

Q. What's his wife's name, please?

A. Frankie.

Q. Now, tell us as nearly as you can recall, please, just what the conversation was? That is, what you said and what he said?

A. I told him that I had been trying to get back into the Party and I didn't seem to be doing too well, that I had

talked to people there and had met with them, but I still wasn't back into the Party. So, he asked me then if my wife was willing to join, too, so I told him, "Well," that, "I am sure she would," but that she wasn't well at the time. She was pregnant, but, "I am sure she would join later," so Charlie told me, he said, "Well, I will see what I can do."

Q. All right, now, when was that with respect to the time you in fact got back in the Party?

A. I would say not over a month.

Q. All right, now, when you did get back into the Party, did you belong to any particular club or group?

A. We belonged to a club, but it never had a name.

Q. Who were the members?

[fol. 438] A. My wife and I and John Stanley.

Q. And with whom had you been making these efforts to be getting back into the Party?

A. John Stanley.

Q. Do you know of your own knowledge now whether Charles H. Wilson was acquainted with John Stanley?

A. Yes, sir.

Q. How do you know that?

A. We had been to his home together.

Q. I see—

Mr. Taylor: Are you leaving that conversation?

Mr. Broome: Yes.

Mr. Taylor: May we have the cautionary, Your Honor?

The Court: In connection with the conversation that the witness has just testified to at the home of Mr. Wilson in 1954, you are instructed, ladies and gentlemen, that the statements made by Mr. Wilson can be used only in the case against him and cannot be used against any of the other defendants in this case.

By Mr. Broome:

Q. Now, after you achieved your re-entry into the Communist Party, did you at a later time have any conversation with Charles H. Wilson?

A. Yes.

Q. And can you tell us as nearly as you can when this conversation was?

A. It was quite a few months later, after I had gotten back in.

Q. Yes, had you seen him in the meantime?

A. No, sir.

Q. Where was the conversation?

A. In my home.

Q. And who was present, please, sir?

A. Charlie Wilson, his wife and my wife and myself.

Q. Let me ask you, Mr. Fikes, to your knowledge was Charles Wilson's wife, Frankie Wilson, a member of the Communist Party?

A. No, sir.

Q. All right, let's have the conversation now, just what did Mr. Wilson say and what did you say in this conversation?

A. Well, he come in and we shook hands and he said, "Welcome back into the fold," and he said to my wife, "Welcome into the fold."

Mr. Broome: Do you want the cautionary, Mr. Taylor?

Mr. Taylor: Yes, Mr. Broome, thank you.

[fol. 439] The Court: Ladies and gentlemen, as to this conversation, you are instructed that any statements made by Mr. Wilson can only be used in the case against Mr. Wilson and not against any of the other defendants in this case.

By Mr. Broome:

Q. Mr. Fikes, did there come a time when there was another change in the status or official status of Charles H. Wilson in the International Union of Mine, Mill and Smelter Workers, in addition to the one you told us about earlier?

A. Yes, he was an International rep in District 5 again, and Asbury Howard took his place as Eastern Vice President.

Q. Now, do you know approximately when this event took place that Mr. Howard succeeded Wilson as Eastern Vice President?

A. That was in 1954, I believe.

Q. And what did Mr. Wilson become? I don't believe I caught what you said.

A. He was an International representative.

Q. Now, who was Board Member in District 5 at this time in 1954?

A. Alton Lawrence.

Q. And do you know if Mr. Wilson was attached then to Mr. Lawrence's staff?

A. Yes, he was.

Q. Do you know where he was assigned or living in 1954?

A. In Tennessee.

Q. Do you know whether from time to time he had occasion to come back and visit in the Birmingham area?

A. Yes.

Q. Now, with respect to this change of status, that is Mr. Asbury Howard becoming Eastern Vice President and Mr. Wilson becoming an International representative, did you in the year 1954 and after those events transpired have any conversation with Mr. Charles H. Wilson with respect to this change?

A. Yes, sir.

Q. And do you remember, please, sir, where that conversation was?

A. In the home of his daughter.

Q. And where is that?

A. In Bessemer, Alabama.

Q. And who was present at the conversation?

A. Charles Wilson, myself and his wife.

Q. All right, now, will you tell us as nearly as you can recall just what the conversation was, and by that I mean just what Mr. Wilson had to say and what you had to say?

A. Well, he said that there had been a Party decision that he step down, and a union decision also, from Eastern Vice President and that they thought that a Negro should

be Eastern Vice President, and he said that he had suggested a Mexican-American that should maybe have it, but they had said that they thought a Negro should have the [fol. 440] job, and so, anyway, he indicated that he wasn't too happy about it. He said that even—the whole Board went along with this, even though he wasn't in full agreement with it. They didn't agree with him on it.

Mr. Taylor: Mr. Broome, before you go on, could we have the time of this conversation fixed more definitely?

Mr. Broome: I think I fixed it as definitely as we could.

Q. Could you do any better than we have when this conversation took place?

A. Well, it was after Charlie Wilson had stepped down from Vice President and had moved to Tennessee.

Q. Is that the best you can do?

A. Yes, sir.

Mr. Taylor: That leaves us a considerable span of years, Mr. Broome.

Mr. Broome: I don't know what—

The Court: Well, if that's the best you can do, that's the best you can do.

Mr. Broome: How's that?

The Court: I say, if that's the best you can do, that's the best you can do. Go ahead to the next question.

Q. Do you remember anything you said at that conversation?

A. Yes, I asked him why he didn't run anyway.

Q. What did he say?

A. He said that, "Well, they have got all the machinery, the press and the men. I wouldn't stand a chance of winning if I run against him."

Q. Is that as much as you can recall now about the conversation?

A. Yes.

Q. Now, at a later date—

Mr. Taylor: Are you through with that, Mr. Broome?

Mr. Broome: Yes.

Mr. Taylor: Could we have the cautionary, Your Honor?
[fol. 441] The Court: As to this alleged conversation, ladies and gentlemen, you are instructed that any statements purportedly made by Mr. Wilson to this witness are not to be considered by you in the case against any of the other defendants and can only be considered in the case against the defendant Charles Wilson.

By Mr. Broome:

Q. At a later date, did you have another conversation with Mr. Wilson about the same matter?

A. Yes, sir, it was quite a while later.

Q. And please do the best you can, Mr. Fikes, by way of fixing the time that this conversation took place, this second conversation?

A. It was possibly—it could have possibly been as much as eight months later that this conversation took place.

Q. Would you recall at this time what year it may have been?

A. I couldn't be positive. It could be 1955 even, as late as 1955.

Q. Where was the conversation, please, sir?

A. It was in Bessemer, Alabama.

Q. Whereabouts in Bessemer, Alabama?

A. It was at Charlie Wilson's home on Fifth Avenue in Bessemer.

Q. Now, who was present at the conversation?

A. Myself, Charlie Wilson and Frankie.

Q. Now, will you please tell us as nearly as you can recall it, just what the conversation was, and by that I mean what he said and what you said?

A. Well, told me that he thought that it was a pretty bad deal there, this stepping down, that the Party had made the decision and they had talked to him there, the Party and also the Board of the union, and that the reason that they asked him to step down, they figured that he was a bad security risk or that he had too many known Communists coming to his house, and that, therefore, that was one of the reasons he was asked to step down.

Q. All right, is that as much as you can recall of what he said?

A. Yes.

Q. Did you recall anything you may have said in response to that?

A. I commented on it, I am sure. I don't remember exactly what I said.

Mr. Broome: All right. The cautionary, Mr. Taylor?

[fol. 442] Mr. Taylor: Yes, please.

The Court: As to this alleged conversation, ladies and gentlemen, you are specifically instructed that any statement purportedly made by Mr. Charles Wilson can be used only in the case of the United States against Charles Wilson and not in the case against any of the other six defendants in this action.

Mr. Broome: May it please the Court, that concludes the direct examination.

* * * * * * *

[fol. 454] Exhibit No. 10, which has just been received by the Court in evidence and purports to be a receipt, as to this exhibit you are instructed that it can be considered by you only as evidence in the case against Mr. Skinner and not against the other six defendants.

Mr. Taylor: May we have a moment, Your Honor?

The Court: Yes.

(Counsel conferred.)

* * * * * * *

Alton Lawrence, called as a witness by the Government, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Broome:

Q. Will you state your name, please, sir?

A. Alton Anderson Lawrence.

Mr. Broome: I'm going to ask you to keep your voice up a little better than that, Mr. Lawrence, because I would like to hear it, and what is more important, the jury should hear it.

Mr. Taylor: So would I, Mr. Broome.

By Mr. Broome:

Q. Where do you live, Mr. Lawrence?

A. I live in Bessemer, Alabama.

Q. How long have you lived in Bessemer, Alabama, or in that area?

A. Since 1941.

Q. What is your occupation, please, sir, at the present time?

A. I operate a business.

Q. I did not get that.

A. I'm a business man, operate a business.

Q. All right, sir. What is the business, please, sir?

A. It's a high fidelity business.

Q. All right. Are you married?

A. I am.

Q. Have children?

A. One.

Q. Were you ever employed, Mr. Lawrence, by the International Union of Mine, Mill and Smelter Workers?

A. Yes, I was.

[fol. 455] Q. What was your employment with them, your early employment with them?

A. I was employed in the latter months of 1941 as a coordinator of organization in District 5, which comprised the southeastern states.

Q. Did you have some title aside from that?

A. No, I was merely called a coordinator of organization.

Q. Did you at any time hold the position of International representative for that union?

A. Well, I think the title of International representative was coincidental with—I was an International representa-

tive, but above and beyond that I was a coordinator of organization.

Q. I see. Now, you mentioned District 5. Is that of the International Union of Mine, Mill and Smelter Workers?

A. Yes, it is.

Q. What did that comprise, please, sir?

A. Well, at that time District 5 comprised the states of Alabama, Mississippi, Tennessee, Georgia, South Carolina —there were other southern states involved, but Tennessee—I think Virginia and Florida were covered, but we had no work in those states.

Q. Could it be said that jurisdiction was in the southeast?

A. In the southeast, yes.

Q. In the southeastern part of the country. Now, at the time you were first employed by that union, do you remember who the Board member was?

A. The Board member at that time was Van D. Jones.

Q. How long was he Board member after your first employment there?

A. He was Board member until the latter part of 1942.

Q. Then was there a change in the Board membership?

A. There was.

Q. Who then became Board member of District 5?

A. Mr. Homer Wilson.

Q. Do you recall how long he remained Board member in District 5?

A. He was Board member until some time in 1947.

Q. Do you know a man by the name of Charles H. Wilson?

A. Yes, I do.

Q. Will you look around and see if you see him in this court room?

A. Yes, I do.

Q. Will you point him out, please.

A. The gentleman on my far left.

Q. All right. To your knowledge, is Mr. Charles Wilson any relation to Mr. Homer Wilson, that you mentioned as being Board member at an earlier date for District 5?

A. My information is that he is not related.

[fol. 456] Q. All right. Now, how long did you continue to be an International representative, Mr. Lawrence, for that union?

A. Well, except for the interruption of my Army service, I was an International representative until the summer of 1950.

Q. All right, sir. Were you in the Army during World War II?

A. Yes, I was.

Q. How long were you in the Army during that conflict?

A. It was between two and a half and three years.

Q. Will you tell us what branch of service, please, sir, that you served in?

A. I was in the Infantry, the Third Infantry Division.

Q. What theater of the war did you serve in?

A. The European Theater.

Q. When was it, again, please, sir, that you got out of the Army?

A. I was discharged from the Army in March of 1946.

Q. At the time you came out of the Army, was Mr. Homer Wilson still your Board member in District 5?

A. He was.

Q. Have you served on the staff of Mr. Charles H. Wilson when he was Board member?

A. Yes, I did.

Q. Now, following your tenure of employment as International representative, did you hold other offices or positions in the International Union of Mine, Mill and Smelter Workers?

A. I was an Executive Board member for the district—that is, the Southeastern District, District 5.

Q. When did you first become Board member for that district?

A. I was elected to that position by the International Executive Board because of a vacancy in the summer of 1950.

Q. Now, do you know whether or not at that time Mr. Charles H. Wilson had any change of position in the union?

A. Yes, he was elevated to the Vice-Presidency, the Eastern Vice-Presidency of the union.

Q. How long, Mr. Lawrence, from the time that you became Board Member of District 5, did you serve as Board member of District 5?

A. Until the autumn of 1959.

Q. All right. Now, you say that Mr. Charles H. Wilson became Eastern Vice-President in 1950. Do you know how long he continued to serve, or how long he did serve, as Eastern Vice-President?

A. I think—believe that he served as Eastern Vice-President until 1952 or '53.

Q. Was there then some change in the position of Eastern Vice-President?

A. Yes, there was.

[fol. 457] Q. What was the change, please, sir?

A. Asbury Howard was elevated to the position. Charles Wilson did not run for re-election. Asbury Howard was elected.

Q. Now, following that election of Asbury Howard as Eastern Vice-President, did Mr. Wilson hold any position or employment in the International Union of Mine, Mill and Smelter Workers?

A. He was an International representative.

Q. Do you know where he was assigned—I mean, in what district?

A. Well, for a time after he again became International representative, he was assigned to District 5 for a period of time.

Q. Then he was on your staff as a Board member of District 5?

A. That's true.

Q. Mr. Lawrence, have you ever been a member of the Communist Party?

A. Yes, I have.

Q. Will you tell us, please, sir, when you first joined the Communist Party?

A. I first joined in the years just before World War II.

Q. How long did you continue to be a member of the party on that occasion?

A. I resigned at the time I went into the Army, which was in the late summer or early autumn, I think, about September of 1943.

Q. Now, when you came out of the Army, did you again become a member of the Communist Party?

A. Well, I had found, while I was in the Army, I—

Mr. Taylor: I move to strike the answer, Your Honor—

The Court: Objection sustained. That portion of the answer will be stricken.

Mr. Broome: All right.

By Mr. Broome:

Q. My question was, after you came out of the Army did you again become a member of the Communist Party?

A. After a lapse of time, and unwillingly, I did, again become a member of the Communist Party.

Q. Do you remember about when it was that you again became a member of the Communist Party?

A. It was in the late spring of 1946.

[fol. 458] Q. Did you become a member at that time of any party, club or branch?

A. No, sir.

Q. Will you describe for us, please, sir, just what your type of membership in the Communist Party was?

A. I was what I believe you would call a member-at-large.

Q. How did you carry on your Party activities or business?

A. Well, on occasion I would have meetings with some functionary of the Communist Party in that area.

Q. How long did this type of meeting you are talking about go on, Mr. Lawrence?

A. It went on up until and through the summer of 1949.

Q. All right, sir. Now, will you give us the names, if you can recall them, of the Communist Party functionaries with whom you met over that period of time?

A. You mean in the period of time after World War II?

Q. That's right.

A. To begin with, Harold Bolton. Following that, Sam Hall, and covering that entire period, a man by the name of Jose Hudson.

By Mr. Broome:

Q. All right, sir, now what position, if you know, in the Communist Party did Harold Bolton hold?

A. Well, he was district organizer. I am not sure of the exact title, but he was in charge of the Alabama District.

Q. And you mentioned a man by the name of Sam Hall. Do you know what position he held in the Communist Party?

A. He occupied the same position.

Q. That is of state chairman or organizer in the State of Alabama?

A. Right, that's true.

Q. Do you know what position in the Communist Party that Mr. Jose Hudson had?

A. Well, he was a functionary at a lower level of the Party, but a functionary of the Party. The exact title, I do not recall.

Q. You had meetings with these three people over a period of time?

A. I did.

Q. Will you describe the meetings? That is to say, were they private meetings?

A. Yes, they were, for the most part what you would call private meetings. A meeting in an automobile or on occasion in someone's house. Clandestine meetings for the most part.

Q. Now, do you know of your own knowledge whether or not during this period that we are speaking about, from the time you got back in the Party after you had got out of the Army and midsummer or midyear in 1949, was Charles H. Wilson a member of the Communist Party?

A. He was.

[fol. 459] Q. And how did you learn this, Mr. Lawrence?

A. I was informed of this by Harold Bolton, the local functionary of the Party.

Q. Well, did you have any discussion or contact with Mr. Wilson as a Party member?

A. After he became Board Member and I became acquainted with him, yes.

Q. All right, and when was your first contact with respect to this matter?

A. There was a discussion in the Union Office in Bessemer, Alabama.

Q. Can you tell us approximately or as nearly as you can the date of that meeting or the period? Do as well as you can in fixing the time.

A. It was in the late spring of 1947.

Q. And this conversation that you speak about, who was present?

A. I recall only the presence of Mr. Wilson.

Q. And yourself?

A. And myself.

Q. Now, do as well as you can for us, Mr. Lawrence, and tell us as nearly as you can recall what the conversation was, and by that I mean what you said to Mr. Wilson and what he said to you.

A. I had been requested by one of the functionaries of the Communist Party—

Mr. Taylor: I move to strike, Your Honor. He has been asked what was said.

The Court: The objection is sustained.

The Witness: I informed—

The Court: Just a minute, Mr. Lawrence. The last answer of the witness will be stricken from the record. The jury are instructed to disregard it. All right, now, you may answer the question.

A. (Continued) I informed Mr. Wilson that I had been requested by a functionary of the Communist Party to set up a meeting where he would re-establish or would establish contact with the local Party group.

Q. And what did Mr. Wilson say?

A. Well, he assented to this.

[fol. 460] Q. All right, now, prior to that time do you know what—that is, prior—

Mr. Taylor: Excuse me, are you leaving that conversation?

Mr. Broome: Yes.

Mr. Taylor: May we have the cautionary instruction, Your Honor?

The Court: Ladies and gentlemen of the jury, you are instructed that this alleged purported conversation between Mr. Charles Wilson and the witness in late spring of '47 as to which he has just testified, that any statements purportedly made by Mr. Wilson shall not be considered by you as evidence against any of the other defendants in this case, and can only be considered by you in the case against Charles H. Wilson.

By Mr. Broome:

Q. Now, prior to the time that Mr. Wilson became Board Member, do you know in what section of District 5 was Mr. Wilson employed?

A. His headquarters were in Bessemer, Alabama.

Q. I am not speaking about his headquarters. Do you know what section of the District he was assigned to prior to the time he became Board Member?

A. He was assigned to Savannah, Georgia.

Q. Now, from the time of that conversation that you have just related, did you from time to time have these meetings that you have described with a Party functionary when Mr. Wilson was present?

A. There were several such meetings.

Q. Mr. Lawrence, do you know a man by the name of Oscar Berland?

A. Yes, I do.

Q. And do you know a man by the name of Bobby G. Fikes?

A. Yes, I do.

Q. Directing your attention to the year 1949, I will ask you if you had any conversation with Mr. Charles H. Wilson with respect to these two individuals that I have just asked you about.

A. Mr. Wilson informed me that—

The Court: Just a moment, this would be a yes or no answer.

A. (Continuing) Yes.

[fol. 461] Q. And tell us as nearly as you can recall it when the conversation was.

A. The conversation took place in the late spring or early summer of 1959.

Q. And where did it take place?

A. It took place in the Union Office in Bessemer, Alabama.

Q. And who was present, please, sir?

A. Mr. Wilson and myself.

Q. All right, now, had you at this time according to your present recollection met either one of the people I have referred to, Oscar Berland or Bobby G. Fikes?

A. No, I had not.

Q. All right, will you tell us now as nearly as you can recall it at this time just what the conversation was and by that I mean what Mr. Wilson said to you and what you said to Mr. Wilson.

A. He informed me—Mr. Wilson informed me—of the names of the identity of two individuals whom he said were sent down to colonize some of the mines in the area in an effort to help us win back locals we had lost to the Steelworker. Union.

Q. Was there anything said about who sent them?

A. They had been sent he said by the Communist Party.

Q. Now, you used the term "colonize." Is that a term which is commonly used in labor union circles?

A. No, sir.

Q. Is it a term commonly used in Party circles?

A. Yes, it is used that way.

Q. Do you know what the meaning of the term "colonize" is as it relates to the Communist Party parlance?

A. It was a practice of sending individuals into an area for the purpose of infiltrating a union or getting into a situation where they might help organize and otherwise be active on behalf of the Communist Party.

Q. Now, you mentioned these TCI Locals. Just what did you mean by that?

A. Earlier in the year 1949, there had been an election—

Q. Well—

A. The TCI Locals were previously, prior to the spring of 1949, were a part of the Mine, Mill and Smelter Workers Union.

Q. Where were they located?

A. They were located in the general area of Bessemer, Alabama.

Q. And what type of industrial activity were the plants involved in where these Locals existed?

A. They were iron ore mining and a dolomite quarry.

[fol. 462] Q. Are those the locals that are commonly referred to as the "red ore Locals" of Alabama?

A. Yes.

Q. Compared to other Locals in District 5, will you tell us, please, sir, what the relative size of these red ore Locals were?

A. At the time, 1949, my recollection is that there were close to 5,000 members in those Locals.

Q. And how did that compare with the rest of the membership in District 5?

A. It was somewhere between a third and a half of the total membership at that time.

Q. All right, now, at this time, in the spring of 1949—well, strike that and let me ask this question—had those Locals previously been affiliated with the International Union of Mine, Mill and Smelter Workers?

A. Yes, sir, they had.

Q. And was there a time when the International Union of Mine, Mill and Smelter Workers lost these Locals?

A. Yes.

Q. And when was that?

A. That was, I believe, in April of 1949.

Q. All right, now, going back to this conversation you had with Mr. Wilson, did you recall anything you had to say with respect to these individuals? That is to say, Oscar Berland and Bobby G. Fikes?

A. I don't recall anything specific.

Q. All right, now, had you had any discussion of this sending colonizers into the area previous to this conversation that you had with—

Mr. Taylor: I am sorry, discussion with whom?

Mr. Broome: Well, I just want to find out if there was a discussion and then I will ask whom.

A. Yes, there had been a discussion.

Q. And who was the discussion with?

A. The discussion was with a functionary of the Communist Party.

Q. Anyone else?

A. Mr. Wilson and myself were present.

Q. Was that at one of these meetings with the functionary that you have told us about?

Mr. Taylor: Mr. Broome, may I just interrupt a moment? I am sorry, I gather you have passed to a different discussion?

Mr. Broome: Well, it relates to the same matter, but it does not relate to the same conversation.

[fol. 463] Mr. Taylor: Well, I will postpone my request.

Mr. Broome: I think there is a question pending, and I would like to have the reporter read it.

The Court: All right, Mrs. Spencer, will you please read the question?

(The reporter read the pending question.)

A. I am still not quite clear as to the question.

Q. Was that at one of these meetings, private meetings, with Party functionaries that you spoke about earlier?

A. Yes, it was.

Q. Can you tell us as nearly as you can when that meeting took place?

A. This meeting took place somewhere between a month and six weeks following the loss of these Locals in April.

Q. Do you remember where it took place?

A. It took place in an automobile.

Q. And who was present in the automobile?

A. As I recall, in addition to Mr. Wilson and myself, it was Sam Hall and Jose Hudson.

Q. Sam Hall was the same Sam Hall you referred to before?

A. It is.

Q. And at this time, what position did he hold in the Communist Party?

A. Well, he was the State Chairman or District Organizer, whichever term is appropriate for the head of the organization in that area.

Q. And what position did Jose Hudson hold at this particular time in the Communist Party?

A. Well, I don't recall the terminology. He was something of a deputy leader in the area.

Q. Will you relate as nearly as you can recall it—well, first, let me ask you, who entered into the discussion in this automobile?

A. Well, I think we all entered into it.

Q. Well, will you give us the names of the people who did the talking?

A. It was discussed by Hall, by Hudson, by Wilson and myself.

Q. Now, all right, let's take up Sam Hall. You tell us as nearly as you can recall what Mr. Hall had to say on that occasion.

[fol. 464] A. My recollection is simply that he told us that there would be two or more men who would be sent into the area by the Communist Party for the purpose of trying to find jobs on Red Mountain. That is, in the mines which Locals were involved in our recent loss, and that

their job would be to try to help from the inside to bring these Locals back into the Mine, Mill and Smelter Workers.

Q. All right. By the way, do you remember what organization these Locals went into?

A. They went into the United Steelworkers of America.

Q. Now, do you remember anything that Mr. Wilson said on that occasion?

A. I have no direct recollection of anything that he said on that occasion.

Mr. Broome: All right. Do you wish your cautionary?

Mr. Taylor: Yes, Your Honor, I believe that—I don't know whether Mr. Broome has finished with the alleged meeting in the Union Hall, but I think we have now two alleged meetings, one in the Union Hall and one in the automobile.

The Court: Ladies and gentlemen of the jury, as to this last meeting, alleged meeting, between the witness and the Defendant Wilson in the automobile, to which he has just testified, you are instructed that any statement made by any person in that vehicle at that time shall not be considered by you as evidence against any of the defendants in this case, except that you may consider it as evidence in the case against the Defendant Wilson, if you find from the evidence that he consented to it, assented to it, or adopted the statements that were made.

Now, as to the meeting in the Union Hall as to which the witness Lawrence has testified, in the late spring or early summer of 1959, you are instructed that any statements allegedly made by Wilson are to be considered by you only in the case against Mr. Wilson and not against any of the other defendants, and any statements made by any other person that have been testified to at that meeting cannot be considered by you as evidence against any of the defendants except as to the Defendant Wilson, and then only insofar as you find that he may have assented to or adopted such statements made by other persons.

[fol. 465] Mr. Broome: May it please the Court.

By Mr. Broome:

Q. Mr. Lawrence, do you recall that in the year 1947, Congress enacted a law known commonly as the Taft-Hartley Act?

A. Yes, I do.

Q. And do you recall that that Act contained a provision requiring the officials of a Union to execute and file with the National Labor Relations Board what are known as non-Communist affidavits in order to qualify for use of the facilities of the National Labor Relations Board?

A. Yes.

Q. To your knowledge, did the Union—that is to say, the International Union of Mine, Mill and Smelter Workers—take any position with reference to compliance with the Taft-Hartley Act after it was passed?

A. The Union took the position of opposing the signing of the non-Communist affidavits.

Q. Do you remember when they first took that position?

A. My recollection is that the Executive Board passed a resolution against the whole bill while it was being considered and in opposition after it had been signed.

Q. All right.

A. That is, after it had become a law.

Q. Do you know whether or not the Communist Party had a policy with respect to compliance with the Taft-Hartley Law?

Mr. Taylor: I will object to that as calling for a conclusion. The witness can say what he observed or heard but not—

The Court: The objection is sustained.

Mr. Broome: All right, sir.

By Mr. Broome:

Q. Did their compliance—first, let me ask you this question. Do you recall how long it was that the Mine-Mill Union maintained its policy of opposition to complying with the Taft-Hartley Law?

A. It maintained this position until the summer of 1949.

Q. And did there come a time when there was a change in the policy of the Union with respect to compliance with the Taft-Hartley Law?

A. Yes, there did.

Q. And when did that change take place?

A. That change took place in the summer, I believe July of 1949.

Q. All right, sir. Now, when did you first learn that a change was being contemplated?

[fol. 466] A. I learned that a change was being contemplated a short while before an Executive Board meeting which took that action. That is, took the action to make the change. It could have been a matter of a week or two weeks. I am not sure.

Q. Have you had any discussion with anyone with respect to a change of policy prior to the time you learned it shortly before the Board meeting?

A. Yes, I did.

Q. And when was this discussion, please, sir?

A. This discussion was possibly two weeks or so in advance. That is, prior to this Board meeting that as I recall took place in July.

Q. And where was it? Where was the discussion?

A. This discussion was in an automobile.

Q. And who was present?

A. I recall the presence of Mr. Wilson and myself and Sam Hall.

Q. Now, is that the same Hall you previously testified about?

A. It is.

Q. And at this time did he still hold a position in the Communist Party?

A. He did.

Q. And what was the position that he held in the Communist Party at this time?

A. He was the State Chairman for Alabama.

Q. Now, would you relate as nearly as you can recall it, Mr. Lawrence, what that discussion was, and in doing so tell us who it was that said what?

A. Sam Hall informed us that he had just come from a meeting of the Communist Party in New York and that at that meeting there had been a discussion as to this entire question of the so-called left-wing or progressive unions signing the non-Communist affidavits. He informed us that a decision had been made at the Party meeting in New York to permit those Unions who felt that compliance with the law might end in destruction or serious damage to the Union, that permission was granted for such unions to sign the affidavit, that is, to comply with that section of the Taft-Hartley Law.

Q. Now, do you recall anything that Mr. Wilson had to say at that meeting?

A. Mr. Wilson said that he would object to that course of action on the part of the Mine, Mill and Smelter Workers.

Q. Did you have anything to say?

A. I am afraid I was noncommittal.

[fol. 467] Q. All right, sir, I believe you mentioned a conversation about this about a week before the Board meeting? Am I correct in that?

A. Yes, there was further discussion of this matter in the Union Office.

Q. And who participated in those discussions?

Mr. Taylor: Your Honor, if Mr. Broome is passing to something else, may we have the cautionary about the alleged discussion in the automobile?

The Court: Ladies and gentlemen of the jury, in connection with the purported statement made by Mr. Wilson at this meeting in the automobile as to which the witness has just testified, you are specifically instructed that such statement can only be considered by you in the case against Mr. Wilson, not against any of the other defendants, and the purported statements made by Mr. Hall at this meeting

should not be considered by you as evidence against any of the defendants except the defendant Wilson, and then only if you find that he assented to or consented to such statements.

By Mr. Broome:

Q. All right, Mr. Lawrence, now with relation to this last conversation I asked you about, you said that was in the Union Hall, and who participated in the discussion?

A. Mr. Wilson and myself and I believe one other staff representative or man who was serving in effect on the staff had a discussion of this matter in the office prior to the July Executive Board meeting.

Q. And do you recall the name of the other person who was serving on the staff at the time?

A. It was Howard Mooney.

Q. Howard Mooney. All right, now what position did he hold, if any, in the International Union of Mine, Mill and Smelter Workers?

A. I don't believe he was an International Representative at that time. I think he had come in to do some work for the time being as educational director in District 5.

Q. Now, let me ask you, to your knowledge at that time was Howard Mooney a member of the Communist Party?

A. To my knowledge, he was.

Q. All right, would you please relate, Mr. Lawrence, just what the discussion was there on that occasion with particular reference to who said what?

A. It was not a very extensive discussion. Mr. Wilson informed us that he was going to an Executive Board [fol. 468] meeting of the Union in Albuquerque and that he understood that the issue of compliance with the law would arise and that he was opposed to it. This in sum and substance was the discussion.

Q. All right, sir, now, did Mr. Wilson go to a Board meeting about that time or shortly after?

Mr. Taylor: Your Honor, may we have the cautionary on that meeting, please?

The Court: As to this last conversation as to which the witness has just testified, ladies and gentlemen, the statements allegedly made by Mr. Wilson should not be considered by you in the case against any of the other defendants, and any—I don't recall whether he testified to any statements made by Mr. Mooney. Did he?

Mr. Taylor: I think not. I think he testified only to statements by Wilson.

The Court: Yes. All right, I think that covers it.

By Mr. Broome:

Q. My next question, I believe, was did Mr. Wilson to your knowledge go to a Board meeting shortly after that?

A. He did.

Q. And did he return from the Board meeting?

A. He did.

Q. Now, after his return from the Board meeting, did you have occasion to attend a meeting in the Union Hall in Bessemer?

A. Yes, I did.

Q. Will you tell us as nearly as you can recall now when that meeting took place with respect to the time that Mr. Wilson came back from the Board meeting?

A. This meeting took place within a few days after his return, somewhere within the week or 10-day period altogether.

Q. Now, with respect to this meeting, had you had any discussion with Mr. Wilson prior to the meeting with respect to whether there was going to be a meeting or not?

A. Very shortly after his return from the Executive Board meeting and in the Union office, Mr. Wilson had informed me that they had taken steps to comply with the Taft-Hartley Law in terms of the Executive Officers of the Union signing non-Communist affidavits.

Q. Yes?

A. And that because this involved certain legal necessities and change in the relationship between Executive Board membership and Staff members who were members of the Communist Party and the Communist Party that [fol. 469] there would be a discussion of this matter held as soon as it could be arranged locally.

Q. Did he say who the discussion would be with?

A. Well, the discussion would include one of the local Communist functionaries, and Mr. Mooney and Mr. Wilson and myself. They were the only names I think that we—

Q. Did he say what would be the purpose of the meeting?

A. The purpose of the meeting was to discuss the decision that had to be made and the effect it would have on our relationships in the local area with the Communist Party.

Q. All right. Now, who—

Mr. Taylor: May we have the cautionary instruction, Your Honor?

The Court: Have you finished this, Mr. Broome?

Mr. Broome: What's that?

The Court: Have you finished this meeting?

Mr. Broome: Yes. I'm about to go to the substance of the meeting now. I finished with the preliminary conversation.

The Court: All right. With reference to this conversation, ladies and gentlemen of the jury, you are instructed that the purported statements made by Mr. Wilson should not be considered by you against any of the other defendants in this case.

By Mr. Broome:

Q. Now, Mr. Lawrence, will you tell us who was present at this meeting?

A. In addition to Mr. Wilson and myself and Mr. Mooney, Jose Hudson, Gene Fikes, and Oscar Berland.

Q. Now, is that the same Jose Hudson you have previously referred to as a functionary in the Communist Party?

A. It is.

Q. And Gene Fikes is the same Gene Fikes you referred to earlier as a colonizer?

A. It is.

Q. And Oscar Berland is the same Oscar Berland you referred to earlier as a colonizer?

A. It is.

Q. Was there any discussion?

A. Yes.

Q. Do you recall who participated in the discussion?

A. Well, Wilson, myself, Hudson, and Mooney, all participated. I don't recall participation on the part of the other two that I recall being present.

[fol. 470] Q. Well, let us take Mr. Hudson. Will you tell us as nearly as you can recall what Mr. Hudson had to say?

A. Mr. Hudson objected to the formula or method that had been outlined by Mr. Wilson with respect to reorganizing our relationship with the Communist Party locally.

Q. All right. Let's start with Mr. Wilson then. Will you please tell us as nearly as you can recall it what Mr. Wilson had to say?

A. Mr. Wilson reported that the Executive Board had taken action to comply with that provision of the Taft-Hartley Law involving the signing of non-Communist affidavits. He said that all of the Executive Officers—that is, those who, under the law, were to sign the affidavits—had to resign from the Communist Party, that in all except one case this took the form of signing letters which were deposited with local functionaries in each area, in which they resigned from the Communist Party, and that in the person of the Secretary-Treasurer, it was a matter of public resignation.

He went on to say that from this point on none of the Executive Officers, or none of the Taft-Hartley-ites, as I believe the term can be used, could have any connection with the Communist Party, could not attend meetings, they could not meet with Party officials, and could not make contributions directly to the Communist Party.

But insofar as Staff members were concerned, there would probably be coordination of their Party activities

from that point on primarily within the Union rather than in terms of a series of connections with local Party organizations, but that the details had not yet been worked out.

But he had indicated that there would be some change in terms of less connection and also in terms of money going into a different area than the local Party organizations. This is my best recollection of his report.

Q. All right. Now, what was it that Mr. Hudson was objecting to?

A. Mr. Hudson objected to several phases of the report, primarily, however, as I recall it, to the inference or the possibility that local contact between Board member and Staff members might be cut off or reduced, and that contributions or dues to the Communist Party might be cut off from the local unit.

[fol. 471] Q. Can you recall what he said, Mr. Lawrence?

A. Well, he said specifically that he thought that some sort of liaison ought to be established between local Staff members who had not signed the affidavits and the Communist Party.

Q. Was there any objection voiced there to that proposal?

A. I objected to it.

Q. Do you recall what you said?

A. Well, I objected to it on security grounds.

Q. Is that as much as you can recall now about that discussion?

A. No. There was discussion back and forth on the part of the individuals I have said discussed the matter.

Q. Well, is there anything in addition that you recall at this time that you have not related?

A. Well, as I recall it, the question of where dues were to be paid and whether there were to be some type of liaison between local staff members who had been or were members of the Communist Party and the local Communist group, and the question of liaison with the Board member was left up in the air for clarification.

Mr. Taylor: Your Honor, he hasn't attributed it to anybody speaking there—

The Court: The motion will be granted and this last response of the witness will be stricken from the record and the jury instructed to disregard it.

By Mr. Broome:

Q. Well, was there any discussion at this meeting with respect to a liaison with Board members?

A. There was.

Q. Now, will you tell us as nearly as you can recall it what that discussion was, and specifically who it was that said what?

A. Mr. Wilson indicated that any liaison that was established would be on a national basis between someone of the so-called Taft-Hartleyite group and somebody in the staff Party group.

Mr. Broome: All right. Do you want to make your—

Mr. Taylor: The cautionary instruction, please.

[fol. 472] The Court: Ladies and gentlemen of the jury, as to this purported meeting that the witness has just testified to, the alleged statement made by Mr. Wilson can only be considered by you in the case against Mr. Wilson, not against any of the other defendants, and statements made by other persons who participated in this conversation cannot be considered by you as evidence against any of the defendants, except as you may find the Defendant Wilson so assented to or adopted any of the statements, and to that extent they may be considered as evidence in the case against Mr. Wilson.

By Mr. Broome:

Q. Mr. Lawrence, at any later date did you have any discussion with Mr. Wilson with respect to this matter of liaison at a national level?

A. Yes.

Q. You did?

A. Yes.

Q. When was the discussion, please, sir?

A. As I recall it, this discussion took place sometime within the next two or three weeks after the meeting which you just referred to.

Q. Where was it?

A. It was in the Union office.

Q. Who was present?

A. I only recall Mr. Wilson and myself being present.

Q. Now, will you tell us, please, sir, what the discussion was, as nearly as you can recall it?

A. He told me that the individual in the national office who would be responsible for coordinating the activities and issuing directives to the staff members who had been or were members of the Communist Party would be Harold Sanderson, that he would be in charge of such questions as contribution or dues.

Q. All right, sir. Now, you know Harold Sanderson?

A. Yes.

Q. Does he hold some position in the Union, or did he, at that time, hold some position in the Union?

A. Yes.

Q. Do you know what it was?

A. I believe he was comptroller.

Q. Employed at the national office?

A. Yes.

Mr. Taylor: The cautionary instruction, Your Honor.

The Court: With reference to this latter meeting that the witness has just testified to, ladies and gentlemen, you are instructed that the alleged statements made by Mr. Wilson should not be considered by you in connection with the case of any of the other defendants in this case. It may be only considered by you as evidence against the Defendant Wilson.

[fol. 473] By Mr. Broome:

Q. Now, Mr. Lawrence, during the latter part of 1949, did you have an assignment at some other place in the

jurisdiction of the International Union outside of District 5?

A. Yes, I did.

Q. Where was that?

A. Flat River, Missouri.

Q. Do you know what district that was in at that time?

A. It was in District 4.

Q. How long were you assigned to work in District 4?

A. I was there for approximately six months, until, I believe, February of 1950.

Q. What did you do then?

A. I returned to Bessemer, Alabama, to my previous assignment, as an International Representative working out of Bessemer, Alabama.

Q. Now, at the time you got back in Bessemer from the assignment in Flat River, Missouri, did you report to the Mine-Mill office in Bessemer?

A. Yes, I did.

Q. At that time what conditions did you find with respect to association in that office with Party members.

Mr. Taylor: Your Honor, I am sorry, I don't understand the question. It seems to me conclusively he hasn't asked the witness for facts.

The Court: The objection is sustained. Would counsel come up to the Bench, please?

At the Bench

The Court: Mr. Broome, how much longer?

Mr. Broome: About five minutes, certainly not longer than ten.

The Court: All right.

In Open Court.

By Mr. Broome:

Q. During that period, beginning immediately with your return to Bessemer, did you see Gene Fikes in the office of the International Union of Mine, Mill and Smelter Workers?

A. Yes, I did.

Q. Did you see Oscar Berland there?
A. Yes.
Q. And Jose Hudson?
A. Yes.

[fol. 474] Mr. Taylor: Mr. Broome, can we have the time specified?

Mr. Broome: I said, immediately after he returned from Flat River. He has already specified that.

Mr. Taylor: That's what I didn't get.

Mr. Broome: All right.

By Mr. Broome:

Q. How frequently would you see them there?
A. Too frequently. They were there frequently.
Q. All right. Were they engaged in any kind of activity in the office?
A. Yes. At that time there was an unemployment council organized in which they were active, along with, well, in which the three men you mentioned were active.
Q. What were they doing in the International Union of Mine, Mill and Smelter Workers with respect to this activity?
A. Well, using the mimeograph machine, using other facilities of the office.

Mr. Broome: You wish a cautionary instruction, Mr. Taylor?

Mr. Taylor: Yes, Your Honor.

The Court: I don't remember any conversation being testified to.

Mr. Broome: No, it was just activity.

The Court: Oh. Well, ladies and gentlemen of the jury, concerning the testimony of the witness just made regarding a purported activity in the union office in Bessemer in early 1950, I believe he testified, you are instructed that this testimony can only be considered by you in relation to any defendant you might find the evidence may apply to.

Mr. Broome:

Q. Now, I believe you testified earlier, Mr. Lawrence, that there was a time when you became Board member?

A. Yes.

Q. That was when?

A. That was in the summer, July, I believe, of 1950.

Q. All right. Do you remember how you came to receive the office at that time?

[fol. 475] A. Yes. Mr. Wilson was elevated to the Eastern Vice-Presidency of the union, and the Executive Board elected me to fill the office he had vacated.

Q. Who brought you that news?

A. Mr. Wilson.

Q. And at that time did you have any conversation with Mr. Wilson?

A. Yes, I did.

Q. Where was this?

A. This was in the union office.

Q. Who was present?

A. Mr. Wilson and myself.

Q. Tell us what the conversation was, please, sir, what he said and what you said.

A. Mr. Wilson advised me of my selection as eastern Vice-President—I mean, as Executive Board member, and said that I would now sign a letter of resignation to the Communist Party which would be deposited with the local functionary. I objected to this on the basis that, I told him, that I had been completely out of touch with the Communist Party since I left for Flat River on the previous year, and I didn't see the necessity or wisdom of writing and signing such a letter. And he told me that these were the instructions he had received, and I should carry them out. And, I did so.

Q. Did you write such a letter of resignation?

A. I wrote such a letter.

Q. Give us as nearly as you can recall the import of the letter.

A. Well, Mr. Wilson had indicated the verbiage to be used, and I believe gave me a copy of a letter I should simply copy. It was merely a statement directed to Mr. Sam Hall saying, "I hereby resign from the Communist Party." I do not recall anything else in connection with it.

Q. All right. When you prepared it, did you sign the letter?

A. I signed that letter.

Q. What did you do with it?

A. I gave it to Mr. Wilson.

Q. Do you know what became of it?

A. I was later informed that it had been destroyed.

Mr. Taylor: Objection, Your Honor.

The Court: The objection is sustained.

Mr. Broome:

Q. In other words, you don't know, of your own knowledge?

A. I don't know of my own knowledge.

The Court: All right. The previous answer will be stricken from the record and the jury instructed to disregard it.

[fol. 476] Mr. Taylor: And the cautionary instruction, Your Honor?

The Court: Yes. Ladies and gentlemen of the jury, as to this purported meeting of Mr. Wilson and the witness, you are instructed that the alleged statements made by Mr. Wilson to this witness at that meeting cannot be considered by you as evidence against any of the defendants in this case other than the defendant Wilson.

Mr. Broome: May it please the Court, that concludes the direct examination.

* * * * * * *

[fol. 494]

MOTIONS TO PRODUCE GRAND JURY TESTIMONY OF FIKES, COLLOQUY AND RULING THEREON

Mr. Taylor: Your Honor, at this point the defense would like to move in the alternative for production of the Grand Jury testimony of the witness Fikes. The alternatives are, as we stated them before, production to the defense or, failing that, for in camera examination by the Court.

I don't think that we have anything in particular to add to the observations made after our presentation on Mr. Locke, other than it seems to us this case is an even stronger one that the possibility of inconsistencies usable for impeachment purposes is even greater here, that there [fol. 495] are apparent inconsistencies between his testimony as given here and given at the previous trial, and, therefore, we would move for the production of the notes.

Mr. Broome: If the Court please, the prosecution's attitude is just the same as it has been before, that this is a matter so much within the discretion of the Court that the Government ought not to take any position about it, and we do not see that there is any particularized need, but that is a matter within the discretion of the Court.

The Court: Well, the Court feels that there has not been shown a particularized need for the production of the Grand Jury minutes of Mr. Fikes' testimony, and for that reason the motion for production as made in the alternative will be denied.

* * * * * * *

[fol. 532] The Court: All right, I think at this time we will also turn over the 3500 documents that were furnished in connection with the witness Lawrence. Which of you gentlemen are going to handle that witness?

(Documents were handed to Mr. Taylor.)

The Court: The decisions are already placed in an envelope and made a part of the record.

Mr. Broome, do you have the photostatic copy of the original that you want to use in place of the original?

Mr. Broome: Yes, I have a photostatic copy of it.

The Court: All right. There were the other documents which you turned over to the Court this morning, Mr. Broome. I have gone over them and I am of the opinion that none of them are producible under Rule 3500. I will also hand them to the Clerk and they may be withdrawn on the substitution of photostatic copies.

Mr. Broome: That's all right.

Mr. Taylor: As to which witness?

The Court: Lawrence. All right. Would you call Mr. Fikes, please.

Mr. Fikes, take the witness stand, please.

BOBBY G. FIKES, resumed the stand for cross examination.

Cross examination.

By Mr. Taylor:

Q. Mr. Fikes, I think I rightly recall that you testified Friday that you went into the Army in 1951?

A. Yes.

Q. Can you place the time, January, February, when?

A. Somewhere around March. I know I was in approximately two months.

Q. How did you get into the Army? Were you drafted? Did you volunteer? What happened?

A. I was drafted.

Q. Where was your local draft board?

A. In Birmingham.

[fol. 533] Q. And where were you inducted?

A. In Birmingham. I was inducted from the Birmingham draft board.

Q. Now, Mr. Fikes, at the time you were inducted or shortly thereafter, did the military authorities present you

with a form which you were asked to sign indicating what organizations you belonged to?

A. Yes.

Q. They did?

A. Yes.

Mr. Taylor: I will ask the Clerk to mark this for identification as Defendants' Exhibit M.

(Defendants' Exhibit M was marked for identification.)

Mr. Taylor: Mr. Broome, I show you this exhibit.

Mr. Broome: I have seen it.

Mr. Taylor: Mr. Broome, will you stipulate that this is a certified copy of this Form DD-98?

Mr. Broome: Yes.

By Mr. Taylor:

Q. Mr. Fikes, may I show you this document which has been marked Defendants' Exhibit M. I will ask you whether or not you can identify this as the document presented to you that you have just referred to. It's these four pages designated as DD-98.

A. Yes.

Q. That is the form?

A. Yes, sir.

Q. And I am aware this is very badly produced, but can you identify that as your signature?

A. Yes, it looks like my signature.

Q. Now, Mr. Fikes, while I am here, do you recall whether or not this form listed, among the organizations to which you were to answer, the Communist Party of the United States?

A. Yes.

Q. Did it list any other organizations that you belonged to at that time? Do you recall?

A. It listed the Labor Youth League, I believe. I had been a member of that.

Q. The Civil Rights Congress?

A. I never paid dues.

Q. You never paid dues?

[fol. 534] Now, Mr. Fikes, I will ask you whether, in signing and returning this form you did or did not reveal to the military authorities your membership in the Communist Party? Did you or did you not say on this form that you had been a member of the Communist Party?

A. I did not.

Q. You did not? In other words, to make it a little clearer, I show you this space for organizations where they were to be listed, and you left it blank, did you not?

A. Right.

Q. Mr. Fikes, was that a mistake which was intentional on your part, or did you do it knowingly?

A. Well, I had talked to some people in regards to this affidavit that it would be presented after I went into the Army.

Q. So you knew beforehand that you were going to have to sign this form?

A. Yes.

Q. You did. So it wasn't by accident or inadvertence that you left this out? Am I right? You left it out intentionally?

A. Well, I was told that since when you went into the Army that you were automatically out of the Communist Party, and that I was also told to go ahead and sign it, because they wanted to know of organizations that advocated the overthrow of the United States Government.

Q. Mr. Fikes, did this form ask you to indicate whether you were at the moment a member of the Communist Party or whether you ever had been?

A. I believe it said, "Are you now or have you ever been."

Q. Yes. Well, it is a fact that you had been, wasn't it?

A. Yes.

Q. Now, to repeat my question, was it accidental or intentional on your part that you did not reveal that you had been a member of the Communist Party, or did you do this intentionally?

A. Well, I don't know how you would refer to an accident actually. I was told there that you were to—that the questions would be, "Do you belong to an organization that advocates the overthrow of the Government?", and, "You can sign this," I was told, because the Communist Party does not advocate the overthrow of the Government.

Q. I must come back to you with the form again. Doesn't this form ask you to indicate whether or not you had ever been a member of the Communist Party, whatever it advocates?

A. Yes.

Q. Is it fair to say, Mr. Fikes, that you deliberately falsified the questionnaire?

A. Yes, sir.

Mr. Taylor: Mr. Clerk, I will return this to you in just a minute.

[fol. 535] Q. Now, Mr. Fikes, when you were inducted into the Army, am I right that you had recently returned from New York?

A. Right.

Q. How long had you been in New York?

A. Oh, I went into New York in 1950 and remained there until the first part of 1951. I spent Christmas in New York.

Q. Well, that leaves us a good deal of 1950. Do you recall how long—how many months you had been in New York?

A. No, I don't recall exactly how many months I spent in New York.

Q. Mr. Fikes, had you been anywhere else between the time you were in New York and when you went into the Army?

A. Did I make a trip outside New York, you mean?

Q. Well, had you lived or been employed anywhere else between your residence in New York and your return into the Army in Alabama?

A. No, I was employed in New York.

Mr. Taylor: Mr. Clerk, would you mark this for identification, please?

(Defendant's Exhibits M and N were marked for identification.)

Q. Now, Mr. Fikes, I show you the document that the Clerk has just marked as Defendants' Exhibit M, and ask you if you can recognize this as a copy of your separation report from the Army?

A. Yes.

Q. It is?

A. Yes.

Q. Now, I call your attention to the line down here numbered—I guess it is 41—and which reads, "dates of last civil employment," and which says underneath, November 1950—January 1951, able seaman, Olympics Steamship Company, Seattle, Washington." Had you been employed in Washington or by that steamship company during that period?

A. Yes, I have. Wait a minute—

Q. Did you go to Seattle? Pardon me?

A. Wait a minute. Let me look at the date again.

Q. I am not sure my colleagues and the jury can hear you, Mr. Fikes.

A. The last time—this is wrong. The last time I went to sea was in 1948.

Q. And where was that?

A. That was, I believe, from Mobile or New Orleans, one.

Q. Well, I will ask you then, were you never employed by the Olympic Steamship in or out of Seattle, Washington?

[fol. 536] A. I believe that was the last ship I sailed on.

Q. In Alabama?

A. I don't recall whether I left from Alabama or Mississippi or New Orleans, but, anyway, the union hall was in New Orleans.

Q. Anyway, the year was 1948?

A. Yes, sir.

Q. So, these years, November 1950 to January 1951 are a mistake?

A. Yes.

Q. Did you sign the form?

A. Yes, they made a mistake.

Q. They? Did you sign the forms, Mr. Fikes?

A. Yes, sir.

Q. May I come back to the question about New York, Mr. Fikes? May I ask you to tell the jury what you were doing while you were in New York? Were you employed? Were you unemployed? What were you doing during that time?

A. I was employed at Appleton-Century Publishers.

Q. Do you remember how long you were employed there?

A. No, I don't.

Q. Mr. Fikes, may I ask you, were you quite sure you didn't in fact go to New York on that occasion in 1949?

A. I come back to Alabama in 1949.

Q. When you were in New York prior to your induction in the Army, did you for a time stay in the apartment of a man named Maurice Paul?

A. Yes, sir.

Q. Do you remember how long you stayed there?

A. No, I stayed there for maybe a couple of weeks or so, I don't recall exactly how long it was, until I got a job with Appleton-Century.

Q. You stayed on in New York after that in 1951?

A. Right.

Q. Do you recall giving testimony at a proceeding involving Maurice Paul in New York City last year?

A. Yes, I did.

Q. Do you recall being asked what period you had been living in New York then at that hearing?

A. Yes, I believe they asked me the question.

Q. Do you recall your answer?

A. No.

Q. I would like to refresh your recollection.

Mr. Taylor: Mr. Broome, I am utilizing page 102 of the transcript you turned over to me. (Document shown to counsel.)

Q. (Continued) Mr. Fikes, I will show you and read to you questions and answers from the proceeding in question, and then ask if that refreshes your recollection.

[fol. 537] "Question: Now, you said you attended about four or five meetings of the Communist Party at Mr. Paul's apartment, is that right?

"Answer: Yes.

"Question: At each of these meetings, five to nine people were attending, as you stated?

"Answer: Yes, sir, but I wouldn't know the exact number.

"Question: Would you say not less than five or more than nine?

"Answer: Right.

"Question: And that was in what year?

"Answer: 1949 or 1950. That is, 1949 and 1950."

Does that refresh your recollection that you so testified?

A. Yes, but I was mistaken on those dates.

Q. Let me be sure I understand. Your testimony now is that when you corrected "1949 or 1950" and said "*1959* and 1950," that that was a mistake?

A. Yes, I have been to Maurice Paul's apartment at later times than that also.

Q. Later times than what?

A. Than when I went up there the first time, when I went to get a job.

Q. Now, Mr. Fikes, I am returning to you this Form DD-98 about the organizations that we discussed a minute ago, and I will ask you whether at the time you signed this form you knew whether or not it was a penal offense to falsify your answer?

Mr. Broome: If the Court please, I object to that.

Mr. Taylor: I am asking if he knew, Your Honor.

The Court: Beg pardon?

Mr. Taylor: I am not asking him whether it was a fact, but whether he knew whether or not it was a penal offense?

The Court: You may answer. The objection will be overruled.

A. Yes.

Q. You did know. Mr. Fikes, may I come to a later [fol. 538] period? Do I recall that you testified last Friday that in 1953 or 1954 when, as you put it, you were rejoining the Communist Party, you sought Mr. Charles Wilson's assistance to get back into the Communist Party?

A. Yes.

Q. And did you testify Friday that when you went to see Mr. Wilson about this, he asked you if your wife, your own wife, would also join the Communist Party?

A. Yes.

Q. Were you at that point dealing with a Mr. John Stanley or Stanford, in your efforts to get back in the Communist Party?

A. Yes, sir.

Q. Mr. Fikes, wasn't it in fact Mr. Stanley or Stanford and not Mr. Wilson, that asked you whether your wife would join the Party?

A. John Stanley or Stanford also asked if she would join.

Q. He also asked? Mr. Fikes, do you recall discussing your rejoining the Communist Party with agents of the Federal Bureau of Investigation about 1953 or 1954?

A. Yes, sir.

Q. Do you recall whether or not you told those agents that you didn't know how Mr. Wilson could possibly have known your wife had joined the Communist Party?

A. Yes, I told him that I know that how they knew—

Q. Pardon me, I couldn't hear you?

A. Yes, the best I can remember, yes. You mean, after I got into the Party, you are referring to, in 1954?

Q. I am talking about the time you got back in, yes. Now, I think you testified on Friday—or, I will ask you—did you testify on Friday that you were in the Communist Party from 1948 to 1951, and then went back in in 1954, is that correct?

A. Yes.

Q. I will ask you, Mr. Fikes, whether it is a fact that you were a member of the Communist Party from shortly after your leaving the Army until 1953? Weren't you a member during that period?

A. No, sir.

Q. Did you say no?

A. No, sir.

Q. During that period did you make contributions to the Communist Party?

A. When I first come back out from the Army, I think I give them $3.00 and that was the extent of it.

Q. That was soon after you came out of the Army?

A. Yes.

Q. During that period, 1951 to 1953, did you attend meetings with members of the Communist Party?

A. I don't think that I attended an official—I met with Party members, yes.

[fol. 539] Q. You did meet with Party members?

A. Yes.

Q. To your knowledge, did the members of the Communist Party where you were living regard and treat you as a member of the Communist Party?

A. Well, they was cordial, if that's what you mean. They didn't discuss Party policy with me.

Q. You did not?

A. No.

Q. This is just a matter of cordiality?

A. Yes.

Q. Mr. Fikes, do you recall testifying at a proceeding before the Subversive Activities Control Board a few years ago?

A. Yes.

Q. The answer is yes?

A. Yes.

Mr. Taylor: Mr. Broome, I am utilizing page 5119.

Q. Mr. Fikes, I would like to show you and read to you two or three questions and answers from the record of that proceeding.

"Question: Now, you got out of the Army in May of '51. Then you were saying something about your not paying dues in the following period, but you made contributions, is that what you are testifying?"

"Answer: To the best of my memory, I did make some contributions."

"Question: How long did that continue?" "Answer: I couldn't say. By that, meaning how long did I continue to make contributions?"

"Question: Yes."

"Answer: I don't remember. I don't even remember the amount. I know that I may have given $5 one time or the other."

"Question: Well, did you begin to attend Communist Party meetings after your release from the Army in 1951?"

"Answer: I had meetings with Communists. They would come to my house quite often."

"Question: Did you consider yourself a member of the Communist Party at that time?"

"Answer: Well, the Communist Party considered me a member."

Does that refresh your recollection that you so testified on that occasion?

A. Yes.

[fol. 540] Q. The answer is yes?

A. It is like I said before, I had meetings with Communists socially after I come out of the Army, yes, sir.

Q. Is it your testimony now that the Communist Party considered you a member?

A. Well, I don't know. In the sense of making monthly payments, they couldn't have considered me a member.

Q. Mr. Fikes, they were your words. I am just asking if your testimony is the same now as it was then?

A. I was not a dues paying member. I guess that you could—I guess you could—the same as I testified to then. I wasn't paying party dues at the time.

Q. And your testimony that the Communist Party considered you a member, is that the same as it was then?

A. Yes.

Q. Mr. Fikes, did you think of yourself as a member of the Communist Party in 1951 and 1953?

A. No. I wasn't a dues payer.

Q. You did not?

A. No.

Q. I didn't ask you that. I ask you if you thought of yourself as being a member.

A. No.

Q. Mr. Fikes, do you recall discussing this question with the FBI when they interviewed you in 1953 and 1954?

A. Yes.

Q. You do?

A. They discussed my becoming a member?

Q. Yes.

A. Yes.

Q. Do you recall whether or not you told them that you considered yourself a member right at that time?

A. I told them I wasn't, to the best I can remember, that I wasn't.

Q. Well, I will refresh your recollection then. Mr. Fikes, I am going to show and read to you extracts from a report of an interview with you on June 30, 1953, and July 27th, 1955. Now, I will read you the relevant paragraphs and ask if that refreshes your recollection.

"Subject was interviewed by Special Agent James L. Pugh and reporting agent on June 30, 1953 and July 27th, 1953."

Then, as you see, you gave them some information about your place of birth and so forth. And then continuing on the next page, "Subject advised that he considered himself a member of the Communist Party at the present time, although he has been rather inactive during the past year." [fol. 541] Does that refresh your recollection that you told the FBI that you were a member then at that time?

A. He must have made a mistake, because in writing it up, I said that I wasn't a dues-paying member at the time.

Q. Mr. Fikes, I must repeat my question is not whether you were paying dues, but whether you considered yourself as a member.

A. I was not a member.

Q. So what you told the FBI was a mistake?

Mr. Broome: I object because that is not what the witness said.

The Court: Objection sustained.

Mr. Taylor: I will withdraw the question.

May I have a few seconds, Your Honor?

The Court: Yes.

(After consultation with co-counsel.)

By Mr. Taylor:

Q. Mr. Fikes, around 1953 or 1954, did there come a time when you received money payments from the Federal Bureau of Investigation?

A. Yes. I believe it was in 1954.

Q. Do you recall how much you received?

A. No, I don't recall. Are you speaking of a specific time?

Mr. Taylor: Excuse me. May it please the Court and ladies and gentlemen of the jury, the Government stipulated that in 1954 to November, 1959, the payments made to the witness totalled $5,020.40.

Q. Mr. Fikes, have there been any other payments since 1959?

A. Yes. I received money from them since then.

Mr. Taylor: Pass the witness, Your Honor.

The Court: Anything further?

Mr. Broome: Yes.

[fol. 542] Redirect examination.

By Mr. Broome:

Q. Mr. Fikes, you were asked on cross-examination about this affidavit you signed when you were inducted into the Army. I believe you stated that you had discussed it, please, sir?

A. Yes. I discussed it with Charles Wilson.

Q. Do you recall when you discussed it with Charles Wilson?

A. That was after I returned to Alabama to go into the Army from New York.

Q. Can you do better than that? Was that in between the time you returned from New York and the time you went into the Army?

A. Yes.

Q. Now, where was this conversation?

A. In his home.

Q. In Bessemer, Alabama?

A. Yes.

Q. Who was present?

A. He, Charlie Wilson, and myself.

Q. All right. Now, will you tell us, please, sir, what the conversation was, as you recall it?

A. Well, he told me that there would be, when I got to the Army, an affidavit for me to sign in regards to the Party and that I should go ahead and sign it. He said the affidavit referred to organizations that advocate the overthrow of the United States Government and the Party does not advocate the overthrow of the Government.

Q. Will you speak louder. I can hardly hear you.

A. And also he said that it was the policy of the Party also that you couldn't be in the Army and be a member of the Party at the same time.

Q. Is that as much as you can recall about it?

A. Yes.

Q. Mr. Fikes, do you have trouble with dates?
A. Yes, sir.

Mr. Broome: No further redirect.
Mr. Taylor: Just one second, Your Honor.
The Court: All right.

Recross examination.

By Mr. Taylor:

Q. Mr. Fikes, you say that Mr. Wilson told you that you couldn't be in the Army and the Communist Party at the same time; is that correct?
A. Yes.
[fol. 543] Q. And the Communist Party did not advocate the violent overthrow of the United States Government; is that correct?
A. Yes.
Q. Is it fair to say then that he told you that you could truthfully sign the affidavit without revealing membership?
A. He didn't tell me whether it was truthful or not. He just said whether I could sign it.
Q. Did you read the questionnaire after you saw Mr. Wilson?
A. You mean after I went into the Army?
Q. You did?
A. Yes.
Q. All right. Did you observe the questionnaire called for whether or not you had been a member of the Communist Party?
A. Yes.
Q. Did you discuss the matter of this affidavit with anybody else, Mr. Fikes?
A. I think I discussed it before I left New York with Nat Ross.
Q. Did you discuss it with anybody in the Army?
A. No.

Q. Did you observe other draftees signing this form at the time you were signing it?

A. I assume they were signing it, yes.

Q. Was there any discussion between them or with you about signing the form?

A. No.

Q. Did the officer give you any instructions about signing the form, the officer who gave it to you?

A. I don't recall now what he said. Of course, the forms were passed out to everyone there.

Mr. Taylor: No further questions.

Redirect examination.

By Mr. Broome:

Q. You mentioned a man by the name of Nat Ross. I believe you said you discussed this matter. Did Nat Ross have any connection to your knowledge with the Communist Party?

A. Yes, sir.

Q. What connection did he have? What position did he have in the Communist Party, if you know?

A. I don't know the exact title that he held in the Communist Party.

Mr. Broome: That's all.

[fol. 544] Mr. Taylor: Nothing further, Your Honor.

The Court: All right. You may step down, Mr. Fikes.

* * * * * * *

[fol. 551] FRED L. GARDNER called as a witness by the Government, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Maddrix:

Q. Will you please repeat your full name?
A. Fred Gardner.
Q. Where do you reside?
A. 1301 Cryden Street, Irving, Texas.
Q. What is your present occupation?
A. I'm a consultant and consolidator for the International Hod Carriers Building and Common Laborers Union of America.
Q. How long have you acted in that capacity?
A. Since January of 1956.
Q. How long have you been in the labor movement?
A. Approximately thirty years.
Q. Were you ever employed by Mine-Mill?
A. Yes.
Q. When was this?
A. In August or September of 1951.
Q. In what capacity were you employed?
A. International Representative.
Q. Who employed you?
A. Raymond Dennis.
Q. Was Raymond Dennis at that time connected with Mine-Mill?
A. Yes.
Q. In what capacity, if you know?
A. Board member for District 3.
Q. District 3. Do you see Mr. Dennis in Court?
A. Yes.
Q. Will you point him out, please?
A. Yes. He is *setting* between Irving Dichter and Jesse Van Camp.

Mr. Maddrix: May the record show a proper identification has been made.

Q. Now, I want you to tell His Honor and the ladies and gentlemen of the jury where you were, who was there, and the whole circumstances surrounding your employment.

A. Well, I was living in Conneaut, Ohio.

Q. How do you spell that?

A. C-o-n-n-e-a-u-t. At the time when Raymond Dennis came to my home in Conneaut and offered me the position—

[fol. 552] Q. Just a moment, please. I want to get the sequence.

Who was present?

A. There was Raymond Dennis, myself, Sam Reed, and part of the time, my wife was there.

Q. Who was Sam Reed?

A. Sam Reed was an organizer for the Communist Party.

Q. For what area? Do you know?

A. Well, he was from the Cleveland area, but his responsibility at that time was trade union work for the Communist Party.

Q. All right. Tell of the conversation and who said what.

A. Well, Raymond Dennis told me that Herman Clott, who was then an international representative in the Cleveland area, was leaving his position to take a job with Mine-Mill as their legislative representative in Washington, and that there was an opening in the Cleveland area for a man. He was prepared to offer that position to me and told me that Mine-Mill was rather small in the area and that I would be required to perform some work with the Civil Rights Congress and the Committee for the Protection of Foreign Born, or any other organizations that the Communist Party was currently interested in. He told me that he was sure that Sam Reed, who had spoken to

me earlier, had probably outlined more in detail the work of these various other organizations outside of Mine-Mill.

Q. What did Sam Reed say, if anything, at this particular meeting?

A. Well, Sam Reed told me that it would be a good chance for me to reestablish myself with the Communist Party, since I had been rather out of touch with it in the Conneaut area, and that I could work with the Civil Rights Congress and the Committee for the Protection of Foreign Born, as well as in the Communist Party organization in the Cleveland area.

Q. Did he have anything to say as to what activities you should devote your time?

A. Well, Sam Reed told me that I should devote a good portion of my time, if not a major portion of my time, to the Community Party organization, including the Civil Rights Congress and the Committee for the Protection of Foreign Born.

Q. Yes. Now, let me ask you this. Were you a member of the Communist Party at that time?

A. Yes.

Q. When had you joined the Communist Party?

A. Approximately 1933.

Q. At this time we are speaking of, were you paying Communist Party dues?

A. Well, yes, in the form of contributions. There was no set dues schedule that I was on. Then we made it more in the form of a sustaining fund or so much per month that we could afford to pay.

Q. And to whom were you paying these contributions or sustaining funds?

A. Sam Reed.

[fol. 553] Mr. Witt: May I ask, has Mr. Maddrix left the conversation of the witness?

Mr. Maddrix: I haven't yet. Just one more question and I think I will.

Q. At that time, did you accept the offer of employment?

A. Yes.

Q. Again, what was the offer? What capacity?
A. International representative.

Mr. Maddrix: Now I am through.

Mr. Witt: Your Honor, may we have the cautionary instruction with respect to the defendant Dennis on this occasion?

The Court: Ladies and gentlemen of the jury, you are instructed that the testimony of this witness concerning the alleged conversations between the witness and Mr. Dennis and Mr. Reed will be used by you only in connection with the case of the United States against Raymond Dennis, not against any of the other defendants on trial; and any statements, that is, statements made by Mr. Dennis, can only be used against Mr. Dennis and not against the other defendants; and any alleged statements made by Mr. Reed in this conversation can be considered by you as evidence against the defendant Dennis only insofar as you may find from the evidence that they were adopted by or consented to by the defendant Dennis. Those statements cannot be considered by you against the other defendants on trial.

By Mr. Maddrix:

Q. Where was your headquarters?
A. Cleveland, Ohio.
Q. Who was in charge of the headquarters there?
A. Raymond Dennis.
Q. Do you know where they were situated at that time?
A. Well, when I first came in, they were at 55th and Euclid, I believe.
Q. Did you ever hear of an organization called the National Negro Labor Council?
A. Yes.
Q. Did you at any time have a conversation with Mr. Dennis concerning that organization?
A. Yes.
Q. Now, fix the time, if you will.
A. Well, probably the beginning of October of 1951.
Q. Where was the conversation?

A. The union office in Cleveland.

[fol. 554] Q. All right. Tell us what the conversation was.

A. I told Dennis that I had some conversations with two of the underground Communist Party leaders relative to the formation of the National Negro Labor Council and that they had stressed the importance of this Council to the Communist Party, and they suggested that I devote the major portion of my time between them and the founding convention of the Council for organizing to get delegates at the Council and to assist in establishing the Council in the Cleveland area. I told him that they had expressed the importance of this as being one of the or the main voice of the Communist Party among the Negro parties.

Q. Yes. Now, what if anything did Mr. Dennis say?

A. He told me that he thought that was correct; he knew of the formation of the organization and that he agreed that I should spend as much time as possible in working for the delegates to the founding convention in assisting and setting up the Cleveland organization.

Q. Did you work prior to the founding convention?

A. Yes.

Mr. Witt: May I inquire, is Mr. Maddrix through with the conversation between the witness and Mr. Dennis about the National Negro Labor Council?

Mr. Maddrix: Just a moment, please.

Mr. Witt: May I suggest—I don't want to keep interrupting Mr. Maddrix—that if Mr. Maddrix will bear in mind and let me know when he is finished, then I won't be interrupting him.

Mr. Maddrix: I will try to do that, Your Honor.

The Court: All right.

Mr. Witt: May we have the cautionary instruction, if the Court please?

The Court: Ladies and gentlemen of the jury, with reference to this alleged conversation between the witness and Mr. Dennis at the union hall in October, 1951, you are instructed that the statements made by Mr. Dennis will be considered by you only in the case of the United States against the defendant Dennis and not against the other defendants.

[fol. 555] By Mr. Maddrix:

Q. Now, to complete the inquiry, where was this founding convention held?

A. In Cincinnati, Ohio.

Q. Do you remember what year?

A. 1951.

Q. Do you recall the month, by chance?

A. I believe it was in October.

Q. I see. Now, tell the Court and the ladies and gentlemen of the jury in just a few words the duties of an international representative.

A. Well, the duties of an international representative was to handle and assist in the handling of grievances and negotiated grievances and to carry on any organization.

Q. Now, you had previously testified that you were instructed to work with the NNLC and the Civil Rights Congress. Did you work with both of those organizations during the time that you were an international representative?

A. Yes.

Q. Who paid your salary?

A. The International Union of Mine-Mill Workers.

Q. Did the National Negro Labor Council ever pay you anything?

A. No, sir.

Q. Did the Civil Rights Congress ever pay you anything?

A. No, sir.

Q. Now, was there a convention in Cleveland of this National Negro Labor Council?

A. Yes.

Q. When was that?

A. Approximately October, 1952.

By Mr. Maddrix:

Q. And just prior to that time, did you have a conversation with Mr. Dennis in reference to the National Negro Labor Council?

A. Yes.

Q. Tell us about that, where it was and when it was?

A. It was in the union office in Cleveland, and I told him that I had met with some of the unavailable Party leaders and that they had asked me to speak to Dennis about the time he was spending with the National Negro Labor Council in the Chicago area and to tell him that they thought he should spend more time in Cleveland with the National Negro Labor Council.

Q. Now, excuse me, were you finished?

A. Yes.

Q. What did Mr. Dennis have to say, if anything, with reference to this?

A. Dennis said he certainly agreed that he should spend more time in the Cleveland area and that that was about it.

Mr. Witt: If the Court please, may we have the cautionary?

[fol. 556] The Court: With reference to the conversation that the witness has just testified to, ladies and gentlemen of the jury, you are instructed that any statements purportedly made by the witness at the time and place indicated cannot be considered by you as evidence against the defendant Dennis except insofar as Dennis may have assented to or consented to such statements, and after such statements made by the defendant Dennis, they can be considered only by you in the case against Mr. Dennis and not against any other defendants in the case.

Q. I believe you have testified that the headquarters at the time you were first employed were located on 55th and Euclid, was it?

A. I believe that's correct. It is on 55th.

Q. All right, now, in that headquarters, were there any filing cabinets?

A. Yes.

Q. How many?

A. One.

Q. Who had access to the filing cabinets?

A. Dennis and myself.

Q. Now, did there come a time, and I hate to use that expression, when the office moved?

A. Yes.

Q. And where did it move?

A. It moved to—I believe it was 1225 Superior Street, in Cleveland.

Q. And when was this, Mr. Gardner?

A. It was in the winter of 1951. I don't remember the month it moved.

Q. Were the files—strike the question. Was the file moved to that office?

A. Yes.

Q. Now, just when you first occupied that office, did you have anything to do with the file?

A. Yes.

Q. What?

A. I was straightening up the file and rearranging it.

Q. And while you were doing so, did you come across any piece of material?

A. Yes.

Q. Tell us what it was.

A. It was a letter of resignation from the Communist Party, signed by Irving Dennis.

Q. Did you mention this fact to Mr. Dennis?

A. Yes, I did.

Q. What did Mr. Dennis say?

A. He told me that he felt that it was perfectly proper that it be in the file, that it was the letter of resignation from the Communist Party that the Party had suggested [fol. 557] that each of the trade union leaders make at the time of the Taft-Hartley affidavits, and the letter merely indicated that he had filed his resignation, and he could find no reason why it shouldn't be in the file.

Q. Could you tell us how many paragraphs that letter contained?

A. As I remember, there were two paragraphs.

Mr. Witt: May we have the cautionary, please?

The Court: You are instructed, ladies and gentlemen of the jury, that the testimony of this witness concerning his alleged conversation with Mr. Dennis in the union office as to which he has just testified, that any statements purportedly made by Mr. Dennis can be considered as evidence

against the defendant Dennis only and not as evidence against the other defendants.

Q. Do you know a man by the name of Maurice Travis?
A. Yes.
Q. And was he connected with the union?
A. Yes.
Q. In what capacity when you first knew him?
A. General Secretary-Treasurer.
Q. Do you see him in the court room today?
A. Yes.
Q. Will you point him out, please?
A. He is sitting on the end with the patch on his eye.

Mr. Maddrix: May the record show proper identification has been made.

Q. Did you have occasion to—strike the question. When did you first meet him?
A. I believe it was in October of 1951.
Q. Did you have occasion to go to Canada with him?
A. Yes.
Q. About when was this?
A. October, 1951.
Q. And where did you go in Canada?
A. Port Colborne, Ontario.
Q. How is Colborne spelled?
A. C-o-l-b-o-r-n-e.
Q. Now, before going to Ontario with him, did you have a conversation with Mr. Dennis?
A. Yes.
Q. And where did that conversation take place?
A. In our union office in Cleveland.
Q. And can you fix a time on that conversation?
A. Well, it was about the first part of October or late in September of 1951.
Q. And, all right now, tell us what that conversation was?
[fol. 558] A. Dennis told me that Travis wanted to attend a meeting of Union members in Port Colborne, and that he had been barred from the Canadian border because of his membership in the Communist Party, and that they had

discussed this and felt that it was proper that I take him across the border, since neither myself nor my car was known on the border.

Mr. Maddrix: All right, Mr. Witt.

Mr. Witt: If the Court please, may we have the cautionary?

The Court: All right, Mr. Witt. Ladies and gentlemen of the jury, as to this alleged conversation between the witness and Mr. Dennis, you are instructed that you can consider that purported conversation, that is any statements made by Mr. Dennis, only in the case against defendant Dennis and not in the case against any of the other defendants.

Q. Now, while on the trip to Ontario in your car, did you have a conversation with Mr. Travis?

A. Well, on the return trip, I had a conversation with Mr. Travis.

Q. Tell us what the conversation was, if you know what I have in mind?

A. Yes. Travis told me that he was very happy that I had come with Mine-Mill, that the Communist Party organization in Cleveland had recommended me highly, and we also discussed his resignation from the Communist Party in relation to his problems in crossing the border. He told me that he felt that the resignation was the *case* of a great deal of his problems, because it was a public resignation and it was recognized pretty much as a subterfuge to avoid prosecution under Taft-Hartley and most people accepted the fact that he was still in the Communist Party.

Mr. Witt: May we have the cautionary, if the Court please?

The Court: With reference to this purported conversation that the witness had with the defendant Travis on the return trip from Canada, as to which he has just testified, you are instructed, ladies and gentlemen, that any statements purportedly made by Mr. Travis at this time can be considered by you only in the case of the United States

against the defendant Travis and not against any of the other defendants in the trial. Mr. Maddrix.

[fol. 559] Q. Do you know Jesse Van Camp?

A. Yes.

Q. Do you see him in the court room?

A. Yes.

Q. Point him out, please.

A. He is sitting between Raymond Dennis and Maurice Travis.

Mr. Maddrix: May a proper identification be noted for the record?

A. Yes.

Q. In the fall of 1952, did you have a conversation with him, and, if so, where?

A. Yes, sir, I had a conversation with Jesse Van Camp at the time of the NLRB election, when Mine-Mill lost the permold plant at Medina, Ohio. I don't remember the exact time. It occurs to me it was in the late fall of 1952.

Q. Where did this conversation take place specifically?

A. In a restaurant near the union office.

Q. All right, relate the conversation, please?

A. Van Camp told me that he felt that he got a rather bad deal in Mine-Mill, that he had previously at a Party meeting agreed to step aside as Board Member from District 3 so that Raymond Dennis could be elected and that he had expected to become the Regional Director, which never materialized in that region.

Mr. Witt: May we have the cautionary, please?

The Court: Ladies and gentlemen of the jury, with reference to this witness' testimony concerning the alleged conversations between him, between the witness, and Mr. Van Camp in a restaurant near the union hall in Cleveland, you are instructed that the purported statements or declarations made by Mr. Van Camp can be considered by you only in the case of the United States versus Van Camp and not as evidence against any of the other defendants.

Q. Did you discuss with Mr. Dennis this conversation you had with Van Camp?

A. Yes, I did.

Q. And where was that?

A. In the union office in Cleveland.

Q. And about how long after your conversation with Mr. Van Camp did this take place?

A. Probably a day or two. It was very shortly after the conversation.

Q. Relate the conversation, please.

[fol. 560] A. I told Dennis what Jesse Van Camp had told me, and I said to Dennis that I felt it was wrong to permit something like this to go on because it was a source—it could become a source of friction within the union. Dennis told me that as far as he was concerned, Van Camp was at the Party meeting where this decision was made.

Q. You say Party meeting?

A. The Communist Party meeting.

Q. All right.

A. And that if he had any claim to become a regional director for the union, he should have raised it at that meeting.

Mr. Maddrix: Mr. Witt.

Mr. Witt: May we have the cautionary, please?

The Court: Ladies and gentlemen of the jury, you are specifically instructed that in connection with this alleged conversation that the witness had with Mr. Dennis, at the time he has just testified, that any statements purportedly made by Mr. Dennis can only be considered by you as evidence in the case of the United States against Dennis and not as evidence against any of the other defendants, and any statements made by this witness in the presence of Mr. Dennis can only be considered by you as evidence against Mr. Dennis insofar as you may find from the evidence that Mr. Dennis adopted or consented to such statements and cannot be considered by you as evidence against the other defendants.

You may proceed, Mr. Maddrix.

Q. Did you know a woman by the name of Edith Loomer?

A. Yes.

Q. What connection, if any, did you have with Mrs. Loomer?

A. She was the office secretary in the district office of the Mine, Mill and Smelter Workers in Cleveland.

Q. Was there at any time any friction between you and Mrs. Loomer?

A. Yes.

Q. And about when was this?

A. Oh, in early 1953.

Q. All right, did you discuss it with Mr. Dennis?

A. Yes.

Q. And where did this conversation take place?

A. In our union office.

Q. Who was present?

A. Dennis and myself.

[fol. 561] Q. Tell us about the conversation.

A. I told him that this friction had developed, that Mrs. Loomer had somehow gotten the notion that I didn't want her working in the office and that it was creating some problems. Dennis told me that she was the wife of Hi Loomer, one of the functionaries of the Communist Party who was then operating, as we call them, unavailable or underground, and that it created quite a problem as far as he was concerned in the office.

Mr. Maddrix: Mr. Witt.

Mr. Witt: May we have the cautionary, please?

The Court: Ladies and gentlemen of the jury, in connection with this alleged conversation between the witness and Mr. Dennis, to which he has just testified, you are instructed that any statements purportedly made by the defendant Dennis cannot be considered by you as evidence against any of the other defendants and may only be considered by you as evidence against the defendant Dennis.

Q. Now, were you subsequently transferred out of the Cleveland office?

A. Yes.

Q. And to where?

A. Buffalo, New York.

Q. And when was this, Mr. Gardner?

A. It was in March or April of 1953.

Q. Now, let me direct your attention to the time one week or so before you were transferred and ask you whether or or not you had a conversation with Mr. Dennis?

A. Yes, I did.

Q. Where did the conversation take place?

A. In Dennis' home in Cleveland.

Q. And who was present?

A. Dennis and myself.

Q. All right, tell us what that conversation was and who said what?

A. Well, Dennis told me there was an opening in Buffalo, New York, and that since the problems had arisen between Edith Loomer and I, he suggested that I accept that opening, since it would certainly be impossible to move Edith Loomer because of the role of her husband operating in the underground at the time, and she needed some employment. I accepted the job in Buffalo.

Q. You accepted the assignment?

A. Yes.

Q. How long after that did you go to Buffalo?

A. Well, I think I went to Buffalo very soon after that on a temporary basis of going to Buffalo and returning each week end to Cleveland.

[fol. 562] Mr. Witt: May we have the cautionary instruction?

The Court: As to this conversation, ladies and gentlemen, you are instructed that statements allegedly made by the defendant Dennis to this witness cannot be considered by you in the case against any of the other defendants. It may be considered only by you in the case against Dennis.

By Mr. Maddrix:

Q. While in Buffalo, did you go to Canada?

A. Yes.

Q. What I mean by that is while you were stationed temporarily in Buffalo, did you go to Canada?

A. Yes.

Q. What was the purpose of your visit?

A. It was the dedication of the Port Coburn Miners' Hall.

Q. Where?

A. At Port Coburn, Ontario.

Q. And this was about when?

A. April or May in 1953.

Q. Do you know a man by the name of Charles Wilson?

A. Yes.

Q. Do you see him in Court?

A. Yes.

Q. Would you point him out, please.

A. He's sitting on this end.

Mr. Maddrix: May the record show a proper identification.

The Court: Yes.

By Mr. Maddrix:

Q. Did you see him there?

A. Yes.

Q. Did you have a conversation with him?

A. Yes.

Q. What was that conversation?

A. Well, he called me off to the side and told me that he was having some problems in his area and having discussions with the Party leadership and he was wondering whether we had the same problems in other areas. He said that he had at a Party meeting agreed to step aside for—

Q. When you say "Party meeting," I would like—

A. That's the Communist Party meeting.

Q. All right.

A. —step aside for Asbury Howard to become the Eastern Vice-President, and that he had also agreed to nominate Howard for that position, and he felt that certainly his loyalty could not be questioned. And he again asked whether or not we are having the same problems in our areas, and I assured him that they were troubled times and that we were.

[fol. 563] Mr. Witt: May we have the cautionary instruction?

The Court: Ladies and gentlemen of the jury, in connection with this reported conversation between the witness and *the* Charles Wilson, you are instructed that any statements alleged to have been made by Mr. Wilson are to be considered by you only in the case of the United States against Mr. Wilson and should not be considered by you as evidence against any of the other defendants in this case.

By Mr. Maddrix:

Q. Now, about how long did you stay in Buffalo?
A. I stayed in Buffalo until about the first of June, 1953.
Q. Were you transferred to some other place?
A. Yes.
Q. Where?
A. To the Coeur d'Alene, Idaho.
Q. Will you spell Coeur d'Alene?
A. I hope I can. C-o-e-u-r d'-A-l-e-n-e.
Q. Now, did you go directly to Coeur d'Alene, Idaho, from Buffalo?
A. No, sir.
Q. Where did you stop enroute?
A. Well, I came first to Cleveland and picked up my family and we then came to Denver.
Q. Do you know a man by the name of Harold Sanderson?
A. Yes.
Q. Do you see him in Court?
A. Yes.

Q. Will you point him out, please.

A. He's sitting between Irving Dichter and Al Skinner.

Mr. Maddrix: May the record show a proper identification has been made.

The Court: Yes.

By Mr. Maddrix:

Q. Do you know whether or not at that time that you stopped by Denver he was connected with Mine-Mill?

A. Yes.

Q. In what capacity?

A. Controller.

Q. Did you have a conversation with him while here in Denver?

A. Yes.

Q. I don't believe I fixed a time. When would that be?

A. Probably about June 10th or 11th, possibly.

Q. What year?

A. 1953.

[fol. 564] Q. Where did this conversation take place?

A. At a drugstore near the union headquarters in the Tabor Building. That is, the drugstore was near the union headquarters.

Q. Yes. Tell His Honor and the ladies and gentlemen of the jury that conversation.

A. Well, Sanderson told me that there was a great deal of trouble in the Coeur d'Alene over the resignation of a former international representative of Mine-Mill by the name of Rudy Hanson and that it had created problems within the Party, the Communist Party members, who were members of the Mine-Mill and Smelter Workers in that area, in the sense that one of the leading members of the union, who was also the most active member and a responsible member of the Communist Party in the area, was leading a fight to present the expulsion of Rudy Hanson from the Communist Party. And because of these problems, Sanderson felt that I would be more effective if I

didn't become involved in any way in Party activities in the Coeur d'Alene, and to remain completely aloof so that I might be able to give leadership to all the forces in that area.

Q. You say "he felt." Did he say just what you have said?

A. Yes.

Q. All right.

A. He also told me that since I was meeting with Travis that evening that I would probably be further briefed in detail by Maurice Travis on the situation there.

Mr. Witt: May we have the cautionary instruction, if the Court please?

The Court: Ladies and gentlemen of the jury, as to this alleged conversation between the witness and the defendant Sanderson in Denver in June of 1953, you are instructed that any statement purportedly made by the defendant Sanderson can only be considered in the case of the United States against Mr. Sanderson and not as evidence against any of the other defendants in the case.

By Mr. Maddrix:

Q. Now, did you have a subsequent conversation with Mr. Travis after your talk with Mr. Sanderson?

A. Yes, I did.

Q. When was that?

A. That was that same evening.

Q. And where did this conversation take place?

A. At the home of Maurice Travis.

Q. Who was present there?

[fol. 565] A. Well, there was Maurice Travis and myself and his wife and my wife. At least the wives were there part of the time.

Q. Tell us about that conversation.

A. Well, he went into a little bit greater detail on the fact that charges against Rudy Hanson had been filed with the Idaho state committee.

Q. Committee of what?

A. Of the Communist Party.

Q. All right.

A. And that they were having some difficulty in getting the Idaho state committee to expel Rudy Hanson, even though the Rocky Mountain Region of the Communist Party here in Denver had concurred that he should be expelled; and that because of that, it was creating some real rough problems in the union. He also told me that Rudy Hanson had a dispute with the present board member who was then a present board member from District 7, Chase Powers, over leadership in that area, and he, as Sanderson did, cautioned me that I should remain completely aloof from the various factions in the union in that area.

Q. Was anything said by him as to whether or not you would be subsequently informed about this situation?

A. Yes, both Sanderson and—

Q. I am just asking about Mr. Travis.

A. Yes. Travis informed me that at some later date when the matter had been clearly through the Idaho state committee of the Communist Party and the political situation within the Communist Party had simmered down, that I would be contacted and that somebody from the Denver union office would inform me who the person would be that would contact me in the Coeur d'Alene area.

Mr. Witt: May we have instruction, please?

The Court: Ladies and gentlemen of the jury, with reference to this alleged conversation between the witness and the defendant Travis in Denver in June of 1953, you are instructed that any statements made by the defendant Travis can only be considered by you in the case against Mr. Travis and should not be considered by you as evidence against any of the other defendants.

By Mr. Maddrix:

Q. Now, in the Coeur d'Alene area, what district was that in?

A. At that time it was in District 7.

[fol. 566] Q. How long did you stay there?

A. I stayed there until—

Q. From what period to what period?

A. —from June, the middle of June of 1953, until February of 1954.

Q. Now, did you receive a telephone conversation from anyone about any transfer?

A. Yes.

Q. From whom?

A. Albert Skinner.

Q. About when was this?

A. That would probably be the end of February of 1954.

Q. What did he say to you?

A. He told me that because of the election, the National Labor Relations Board ordering an election among the Butte miners, that he had been authorized by the international officers to take charge there and to get help from any of the representatives wherever he could. And he was instructing me to report to Butte to assist in that National Labor Relations Board election campaign against the United Steel Workers.

Q. Do you know Mr. Skinner?

A. Yes.

Q. Do you see him in the Court?

A. Yes. He is sitting between Charlie Wilson and Harold Sanderson.

Mr. Maddrix: May the record show a proper identification has been made?

The Court: Yes.

Mr. Witt: May we have the cautionary instruction?

The Court: As to this alleged telephone conversation with Mr. Skinner, ladies and gentlemen, you are instructed that any statements allegedly made by Mr. Skinner can be considered only in the case against the defendant Skinner and not against the other defendants in the case.

By Mr. Maddrix:

Q. What was going on in Butte which necessitated your attendance there?

A. There was a National Labor Relations Board election ordered among the Butte miners, and this was a campaign between the United Steel Workers and the International Union of Mine, Mill and Smelter Workers, competing for the votes of the Butte miners in that election campaign.

[fol. 567] Q. Did you go to Butte?

A. Yes.

Q. About when was that?

A. About the end of February in 1954.

Q. Who was in charge of the campaign on behalf of Mine-Mill?

A. Albert Skinner.

Q. Did you contact Mr. Skinner there?

A. Yes.

Q. What function was Mr. Skinner performing in directing this campaign? Just in a few words.

A. Well, he was in charge of the campaign and made assignments as to what work we would do.

Q. And would all of you or any of you report back to him whether or not you had performed your assignments?

A. Yes.

Q. How often was this report made?

A. Well, usually every day.

Q. I see. And that was to Mr. Skinner personally?

A. Yes.

Q. Now, name some of the members of Mine-Mill who had been brought in there to assist in the campaign who were not residents of Butte.

A. Well, in addition to Al Skinner and myself, there was Mike Ross, McCloud D. Yoborosa, Mike Bailiff, Albert Pezzati, Cozy Dolan, Sam Feldman. That's all I can remember now.

Q. Yes. Did you know a man by the name of Arthur Moralez?

A. Yes.

Q. Do you know whether or not he was connected with Mine-Mill at that time?

A. Yes, Arthur Moralez was on the staff of Mine-Mill. He was one of the local Butte miners who was on the staff of Mine-Mill at that time.

Q. Do you know whether or not he participated in the campaign?

A. Yes, he did.

Q. Now, you mentioned an election. Was there any representatives from any governmental agency in Butte at this time to supervise the election?

A. Well, March 22nd I believe it was that the election was held—

Q. What year?

A. 1954. I couldn't be positive of that date. That sticks in my mind. At that time, certainly, representatives—

Q. I don't want you to say unless you know. I don't want you to guess at that. Do you know whether any representatives from—

A. Yes, I do. I say certainly on that day representatives of the National Labor Relations Board were present to conduct and supervise that election.

[fol. 568] Q. Who won the election, by the way?

A. Mine-Mill.

Q. Now, I don't know whether you mentioned this or not, but were you there on a permanent assignment or a temporary assignment?

A. No. On a temporary assignment.

Q. Were you assigned there permanently after the election?

A. Yes.

Q. Who assigned you there?

A. Albert Skinner.

Q. Did you have a conversation with Mr. Skinner in reference to any transfer?

A. Yes.

Q. Where did that conversation take place?

A. At the office of the Mine Mill and Smelter Workers in the Meadows Bank Building in Butte.

Q. About when was this?

A. I believe it was the day of the election or the day after the election in March of 1954.

Q. That would be March 24th, something in there?

A. Yes.

Q. Who was present?

A. Well, there was Albert Skinner, Bob Schrenk and myself.

Q. Tell us about that conversation.

A. Well, Skinner told me that there had been some discussions in the Party on the necessity of assigning an international representative to Butte who would more or less ride herd on Ernest Salvas who was a very weak board member from that district, that it had been decided at Party meetings that I would be the representative assigned there.

Q. Was Salvas, to your knowledge, a member of the Party at that time, the Communist Party?

A. Not to my knowledge, he wasn't.

Mr. Witt: May we have the cautionary, please?

The Court: Ladies and gentlemen of the jury, you are instructed that at this alleged conversation between the witness and Mr. Skinner, that any statements purportedly made by Mr. Skinner can only be considered by you in the case of the United States against the defendant Skinner, and not as evidence against any of the other defendants in the case.

Q. When did you physically move to Butte?

A. Early part of June, 1954.

Q. And what position did you occupy?

A. International representative.

Q. Did you have occasion to attend a meeting of the staff people in the Grand Hotel in Butte in 1955?

A. Yes.

[fol. 569] Q. About when in 1955?

A. I believe it was in January of 1955.

Q. And that was at the Grand Hotel?

A. Yes.

Q. And who was present?

A. Well, there was Albert Skinner, Chase Powers, James Durkin, Ernest Salvas, myself, Hula Kalafatich was there.

Q. Hesitate a little bit. Can you spell Kala—I can't even pronounce it.

A. K-a-l-a-f-a-t-i-c-h.

Q. Now, you mentioned a nickname for him?

A. Hula.

Q. How do you spell that?

A. H-u-l-a.

Q. Do you know what his correct first name was?

A. I believe it is George, although we all knew him by the nickname.

Q. All right, now, was there any discussion at this particular meeting?

A. Yes.

Q. And what were the topics discussed, do you remember?

A. Well, the main topic at that meeting was the best methods of controlling the Montana leadership meeting which was to be called for Sunday.

Q. To be called Sunday, you say?

A. Yes, and I believe it was the following Sunday, and to make some assignments on how that meeting was to be handled.

Q. Did Mr. Skinner have anything to say?

A. Yes, Skinner told us that it was necessary at this time to give unqualified support to Maurice Travis in the dispute with the Butte miners who had adopted a resolution calling for the immediate resignation of Maurice Travis for his Communist affiliations. Skinner told us we had to get in there and support Travis, and he also suggested that the staff draft a resolution of support, and that Salvas would lead off as a Board Member from that district in presenting the resolution and discussing the resolution.

Q. Now, you have mentioned one resolution?

A. Yes.

Q. Was there an opposing resolution?

A. Well, there was not an opposing resolution at that meeting in the Grand Hotel.

Q. Was not. All right.

Mr. Witt: Are you leaving the Grand Hotel?

Mr. Maddrix: Yes—no, just a minute, I want to check.

Q. Now, did you have anything to say at this particular meeting?

[fol. 570] A. Yes, I told them that I felt that controlling that meeting would be rather difficult, that we were underestimating the mood of the leadership of the Mine, Mill and Smelter Workers in Montana and that I felt it was not even wise to have such a meeting.

Mr. Witt: Your Honor—

The Court: Ladies and gentlemen of the jury, as to the alleged conversations or statements made by Mr. Skinner at this purported meeting in the Grand Hotel, to which the witness has just testified, you are instructed that any statements or declarations made by Mr. Skinner can only be considered by you as evidence aginst the defendant Skinner and should not be considered by you as evidence against any of the other defendants.

Q. Now, on the day of this meeting, was there a staff meeting of Mine-Mill at the union office?

A. Yes.

Q. Who was present?

A. Well, there was Al Skinner, myself, Chase Powers, Hula Kalafatich, Ernest Salvas, Jim Durkin—or, not Jim Durkin—Doherty.

Q. Now, at that time was there any discussion concerning another resolution?

A. Yes, there was.

Q. What was that?

A. Cozy Dolan, who also attended that staff meeting, both staff meetings, turned to me and said that a resolution that

I had accepted responsibility for was a Ken Eckert type of resolution and was designed to destroy the union and not to build it.

Q. Now, are you through?

A. Yes, I am through.

Q. What was this resolution to which he referred?

A. Well, the resolution was a compromise resolution that was actually drafted by Ernest Salvas and J. P. Mooney and myself in a restaurant the night before. It was a resolution that called for Travis to make a declaration that he would not be a candidate for any elective office in the union at the coming convention.

Q. Did Mr. Skinner have anything to say in reference to this? As to this resolution, I am speaking about?

A. Skinner spoke in favor of the majority resolution. That is, of the resolution in support of the Mine-Mill leadership and of Travis in particular, but I don't recall him having anything specific to say about my resolution or the resolution that I accepted responsibility for.

[fol. 571] Q. I see, was there at this meeting anyone designated to speak at the coming meeting in the union hall?

A. Yes, Salvas and myself were both designated to speak at the meeting in the hall.

Mr. Witt: May we have the cautionary?

The Court: Ladies and gentlemen of the jury, you are instructed that any statements allegedly made by this witness at the meeting in the union hall about which he has just testified, that any such statements cannot be considered by you as evidence against any of the defendants except as to the defendant Skinner, and then only to such extent as you may find from the evidence in the case that the defendant Skinner consented to or adopted such statements.

Q. Was there a meeting that day in the Miner's Union Hall in Butte?

A. Yes.

Q. And were any resolutions offered at that meeting?

A. Yes, Salvas offered the resolution in support of Travis.

Q. Can you recall some of the Mine-Mill people who were present?

A. Well, all those that I named attending that meeting were present at that time. That's Skinner, Dolan, Chase Powers, Doherty, myself, Salvas.

Q. Did anyone offer this staff resolution for a vote?

A. Yes.

Q. Who was that, do you recall?

A. Ernest Salvas.

Q. What was the vote?

A. There was not a vote taken. The resolution died for want of a second.

Q. Want of a second. You named quite a few Mine-Mill people who were there. Were they in a position to second this resolution?

A. Well, most of them were not members of the Butte miner's union. I believe that Salvas and myself and probably Hula Kalafatich were probably the only ones there from the staff who was in a position to second the motion.

Q. In other words, these other people who were not members of this particular Mine-Mill section of the union could not vote at that time or take any part in the activities?

A. That's correct.

Q. But you could have seconded it?

A. Yes.

Q. Did you?

A. No, sir.

Q. About how many people were present?

[fol. 572] A. Oh, to the best of my recollection, probably two hundred and fifty, three hundred people.

Q. Now, was there a vote taken on the other resolution?

A. No, sir.

Q. Now, the resolution that called for Mr. Travis' resignation, was that put up for a vote?

A. Well, there was a motion on that.

Q. A motion. All right, and tell us what the motion was?

A. A motion was made by one of the Butte miners that we demand the immediate resignation of Maurice Travis for his Communist affiliations, and that motion carried with very, very few dissenting votes.

Q. About how many people were there?

A. About two hundred and fifty or three hundred.

Mr. Maddrix: I don't know whether you want an instruction on this or not. I am through with the meeting.

Mr. Witt: Okay, proceed.

Q. Did you attend a special executive board meeting in Denver in February of 1955 at the Cosmopolitan Hotel?

A. Yes.

Q. How did you happen to attend this board meeting?

A. I was told by the board member, Ernest Salvas, in Butte that I was being summoned before the International Executive Board to explain my lack of support for a strike settlement that had been made the previous year, as well as my leadership to the anti-Travis forces in Mine-Mill in Montana.

Q. And did you attend the meeting?

A. Yes.

Q. Who was present?

A. Well, there was Skinner, Sanderson, Dennis, Travis, two vice presidents, Orville Larson and Asbury Howard, International President Jack Clark, Ernest Salvas I believe I mentioned, and Alton Lawrence from District 5, and I believe that's all I remember. Well, no, there were others. There were Jim Durkin, who was president at that time, and James Doherty, who was present. They were not Board members, but they were present at the board meeting.

Q. Tell us what took place at this meeting?

A. Well, I was called in. The Board had been in session for some time when I was called in. I was called in and asked to explain my role—

Q. Had you been waiting to be called in?

A. Yes.

Q. All right.

A. And I told them that I was very unhappy with the two cent settlement that had been rammed down the throats [fol. 573] of the Butte miners and that I had been very openly expressing my unhappiness with the role of the *Internation* union, including Board Member Salvas, in effecting that type of settlement. I also told them that I felt that Travis' role in the union had not been a constructive one, and while I may have been mistaken in my support of that and my failure to support the resolution at the Montana leadership meeting that pretty much was my position.

Q. Now, was there any comment about your explanation? Did anybody say anything or did they keep quiet?

A. No, I was called in merely to state my position and not actually for it to be discussed, and I don't recall—at this moment, I don't recall any discussion on it.

Q. All right, at that time did the Board take any action in respect to any change in officers of the union?

A. Yes, while I was present at a Board meeting, there was some discussion around Travis' resignation and Travis offered his resignation to the Board at that time and said that he would be willing to offer that resignation provided the Board would select the man whom he felt most nearly represented his views to be his successor, and the Board took action to accept his resignation. He did name Albert Pezzati as his choice for his successor and the Board did accept Albert Pezzati as a replacement for Secretary-Treasurer and they also took action to name Irving Dichter as the Board Member from District 6.

Q. To replace whom?

A. To replace Albert Pezzati, who was then the Board Member from District 6.

Mr. Witt: If the Court please, I am sorry, I was a little tardy with respect to the prior incident the witness testified

about when he said that he attended the Board meeting and stated his position with respect to the strike and Travis, and with respect to that episode, may we have the cautionary?

The Court: I don't see how any cautionary applies here.

In connection with this meeting at the Cosmopolitan Hotel, in 1955, to which this witness has just testified to, where he was called into the building and asked to state his position, you are instructed that statements purportedly made by this witness at this meeting cannot be considered by you as evidence against any of the defendants except the defendants Skinner, Travis, Sanderson and Dennis, and it can only be considered by you as evidence against any of those defendants insofar as you may find from the evidence that such defendant consented to or adopted the statements made by the witness.

[fol. 574] At the Bench.

Mr. Maddrix: Your Honor, I think at this board meeting his testimony is that Travis had said that he would resign if he could place a person whose views were similar to his own. That was also at this meeting.

Mr. Witt: Are you saying that that was the testimony of the witness this morning?

Mr. Maddrix: Yes, now.

Mr. Witt: I don't think so. I think Mr. Maddrix has it a little twisted. But there is no use arguing. Let's look at the record.

The Court: All right.

In Open Court.

The Court: Ladies and gentlemen of the jury, I think this would be a good time for you to have a break. So we will take a brief recess. You may go to your jury room.

(At this point, the jury having left, the Reporter read the requested testimony.)

Mr. Taylor: We confess our error.

The Court: We will take a ten-minute recess.

(The trial recessed at 11:55 a.m., and reconvened at 12:10 p.m. in the presence of the jury.)

Mr. Witt: If the Court please, we would like the cautionary instruction on the question we discussed at the bench.

The Court: Ladies and gentlemen of the jury, in addition to the instructions which I have previously given regarding this meeting as to which the defendant has testified, this meeting having been testified to as being held in the Cosmopolitan Hotel in Denver, 1955, I wish to further instruct you that in connection with statements allegedly made by the defendant Travis, they cannot be considered by you as evidence against any of the other [fol. 575] defendants in this case. It can only be considered by you as evidence against the defendant Travis, except that it may be considered by you as evidence against the other defendants present according to the testimony, Skinner, Sanderson and Dennis, if you find from the evidence that those defendants adopted or consented to statements made by the defendant Travis.

By Mr. Maddrix:

Q. Mr. Gardner, let me carry you back just a little ways to the Miners Union Hall to the meeting when the staff resolution failed to get a second. Do you recall the meeting I am speaking of?

A. Yes.

Q. Did you have anything to say at that meeting?

A. Yes.

Q. What did you say?

A. I told them that I felt that the destiny of the Butte miners was in their own hands and that they alone would decide what to do about this issue or any other issues, and that was it.

Q. All right. Now, you have told us about a requested appearance at a staff meeting. Now, I want to ask you, while in Denver, did you attend any other kind of a meeting after this board meeting session?

A. Yes.

Q. Where was that meeting held?

A. It was held in one of the upstairs rooms at the Cosmopolitan Hotel.

Q. How did you come to that meeting?

A. Skinner advised me in the lobby of the hotel of that, that such a meeting would be held for the purpose of getting a position that would be given to the Rocky Mountain Region of the Communist Party for their consideration.

Q. I see. What kind of meeting would you say this was?

A. This was the Communist Party meeting.

Q. All right. You say it was held in the Cosmopolitan Hotel in this city?

A. Yes.

Q. Who was present?

A. Sanderson, James Doherty, Al Skinner, Jim Durkin and myself.

Q. All right. Who shared that meeting or who opened it?

A. Skinner opened it.

Q. What did he say?

A. He said they were there to get this information separate from the union for the Rocky Mountain Region of the Communist Party so that they could be better able to judge my views.

Q. Did you express your views at that time?

A. Yes, I did.

[fol. 576] Q. What did you say?

A. I told them that I had been very unhappy with the sellout of the Butte miners, and I had given or lent some support and was opposed to Travis being secretary-treasurer of the union because of disruption—

Q. Because of what?

A. Because of the disruption within the union.

Q. I see. Anything else that you can recall at this time?

A. No. That's substantially it.

Mr. Maddrix: All right. Mr. Witt.

Mr. Witt: May we have the cautionary instruction, if the Court please, with respect to the defendants Skinner and Sanderson at this session at the Cosmopolitan Hotel?

The Court: Ladies and gentlemen of the jury, you are instructed that any statements purportedly made by this witness at the alleged meeting in the hotel room can be considered by you as evidence only against the defendants Skinner and Sanderson and only to such extent as you may find that those statements were adopted by or consented to by defendants Skinner and Sanderson, and they should not be considered by you as evidence against any of the other defendants in this case.

By Mr. Maddrix:

Q. I should have asked you this and didn't. About how long was this after the board meeting?

A. I believe it was the same day, although it could have been the following day.

Q. All right. Now, do you know Irving Dichter?

A. Yes.

Q. Do you see him in Court?

A. Yes.

Q. Will you point him out, please.

A. He's sitting between Raymond Dennis and Harold Sanderson.

Mr. Maddrix: May the record show a proper identification has been made?

The Court: Yes.

By Mr. Maddrix:

Q. Did you have any conversation with him in March of 1955?

A. Yes.

Q. Where did that conversation take place?

A. In my home in Butte.

Q. Who was present?

A. Irving Dichter, myself, and my wife.

[fol. 577] Q. Did you know he was coming to your home before?

A. Yes.

Q. How?

A. He had called me on the telephone, told me that he had some matters that he wanted to talk over with me that he could best do in the privacy of the home.

Q. All right, and you say he came there?

A. Yes.

Q. What did he say?

A. He said that he was there to investigate my failure to support the strike settlement that had become an issue in the Union and also to investigate my role in giving leadership to the anti-Travis forces in Montana.

Q. All right?

A. And to tell me that I should understand that Mine-Mill is an important Union, that it is one of the last real strongholds of the Party where the Party voice to the trade union movement could be heard.

Q. What Party?

A. Communist Party.

Q. Yes, go ahead.

A. I told him then that Bob Shrank was there investigating, and he told me I was correct.

Q. Just a minute—go ahead.

A. He said that was correct, he was aware that Shrank was there. He had come in at the insistence of Jack Clark, International President, to investigate for the Union, that he was in there to make his recommendations to the Rocky Mountain Region of the Communist Party and that I should understand the seriousness of it because if it was felt by the Party that I was not correct in what I was doing that I could very well lose my job.

Mr. Maddrix: Mr. Witt?

Mr. Witt: May we have the cautionary, please?

The Court: Ladies and gentlemen of the Jury, in con-

nection with this alleged conversation between the witness and the defendant Dichter in the witness' home in Butte in March of 1955, you are instructed that statements allegedly made by the defendant Dichter can only be considered by you as evidence in the case of the United States against the defendant Dichter and should not be considered by you as evidence against the other defendants in the case.

Q. How long after this Dichter conversation and visit to your home did you remain in the Union?

[fol. 578] A. Until about May or June of 1955.

Q. And how long would that be after his visit?

A. Just a couple of months.

Q. What happened then?

A. I was fired.

Q. How long after Mr. Dichter's visit to your home did you remain in the Communist Party?

A. I think about a month.

Q. What happened?

A. I was expelled, or at least I was told by one of the members of the Communist Party in Butte that I was expelled.

Mr. Maddrix: May we have just one second for conference?

The Court: All right.

(Counsel conferred.)

Mr. Maddrix: Your witness.

Mr. MacDonald: If the Court please, at this time I would like marked for identification as Government's Exhibit 16 a copy of the Official Proceedings of the 45th Convention of the International Union of Mine, Mill and Smelter Workers, 1949.

(Government's Exhibit No. 16 was marked for identification.)

Mr. MacDonald: With the Court's permission, I would like to offer in evidence a part of page 227 and a part of page 228 of the exhibit.

(Government Exhibit No. 16 was shown to counsel.)

Mr. Taylor: No objection.

The Court: The exhibit will be received.

Mr. MacDonald: May I have permission to read it to the jury?

The Court: Yes.

Mr. MacDonald: Delegate Van Camp speaking:

"Brother and Sister Delegates, this is probably one of the [fol. 579] most happy moments of my time, to be able to place in nomination for the Board membership in District 3 the man that I will a little later name.

"I am one of the many of you that thinks this is one of the greatest unions that workers ever had the privilege of belonging to. That has been demonstrated here in this past week at this Convention. This is a Union which has demonstrated beyond a shadow of a doubt in all of its deliberations in work this week that this is the Union that champions the rights of minority groups.

"For years this Union has championed the rights of minority groups, and I believe this Union was sincere, definitely sincere, when they have stood out in the forefront in their fight, particularly for the minority groups, and in its interests of trade unionism.

"I don't think I need to say it, but it is a fact that on this International Executive Board of this International Union there is not a member of minority groups, and it gives me, as I said at the beginning, the utmost gratifying feeling to place into nomination for Board Member of District 3 a Negro who I have worked personally with in American Zinc strike and throughout other controversies in District 3, a man who has been an International Representative for quite some period of time, a man who is respected by his people, the other Negro brothers, a man that has long been,

and his record stands to prove that, an honest trade unionist, a man that I am confident that with the cooperation that I know definitely I will give him and the other members of District 3 will give him will be able to do an outstanding job as Board Member of District 3.

"Without any further ado, I am most happy and in fact the happiest even yet in the trade union movement to place into nomination the name of Brother Ray Dennis."

Mr. Maddrix: May we have just a moment, please?

(Counsel conferred.)

Mr. MacDonald: This was a speech taken from the Official Proceedings of the 46th Convention of the International [fol. 580] Union of Mine, Mill and Smelter Workers, held in Chicago, Illinois, at the Sherry Hotel, September 12th to 17th inclusive, 1949.

Mr. Taylor: Your Honor, may we have the cautionary instruction with respect to Exhibit 16, limiting its consideration with respect to the defendant Van Camp?

The Court: Ladies and gentlemen, as to the exhibit which Mr. MacDonald has just read to you, you are instructed that statements purportedly made by the defendant Van Camp can only be considered by you as evidence against the defendant Van Camp and should not be considered by you as evidence against any of the other defendants except the defendant Dennis and can only be considered as evidence against the defendant Dennis insofar as you find from the evidence that he consented to or adopted the statements.

Mr. Taylor: May we approach the Bench, Your Honor?

At the Bench.

Mr. Taylor: I wasn't aware there was any indication or proof of other defendants being present at all. It was Van Camp's speech. Do we know of anybody else being present?

The Court: But he nominated Dennis.

Mr. Taylor: But this doesn't mean Dennis was there.

The Court: But I think it can be used against Dennis if he consented to it. I don't think he had to be there at that time.

Mr. Taylor: Exception.

Mr. Maddrix: Exception is always understood.

Mr. Taylor: Yes.

• • • • • • •

[fol. 581]

RENEWAL OF MOTIONS AFTER CROSS-EXAMINATIONS TO PRODUCE GRAND JURY TESTIMONY OF FIKES, COLLOQUY AND RULING THEREON

Mr. Witt: At this time also, with respect to the witness Fikes, we renew our motion in the alternative with respect to the production of his Grand Jury testimony. That is the motion that we made at the end of his direct testimony. We are now renewing it in view of what transpired in his cross-examination.

The Court: Do you care to say anything about this?

Mr. Broome: My position is just the same as it has been. It is within the discretion of the Court, and the Government just takes no position about it.

The Court: All right. The Court is of the opinion that the defense has not shown a particularized need for the production of the Grand Jury minutes of the witness Fikes, and therefore, the motion to produce them as a motion made in the alternative, both phases of it will be denied.

• • • • • • •

[fol. 617]

MOTIONS TO PRODUCE GRAND JURY TESTIMONY OF GARDNER, COLLOQUY AND RULING THEREON

Mr. Witt: If the Court please, I don't believe we have done so yet—if we haven't, we now move to strike the direct testimony of the witness Gardner based on the Campbell [fol. 618] footnote. At the same time we make our customary demand with respect to the Grand Jury testimony of this witness in 1956 and again, of course, that's in the alternative, and as I tried to say before, if the Court please, this is independent of our demand for the Grand Jury testimony under Section 3500.

The Court: I'm not sure I understand on what basis the demand is being made then. What right do you have to the minutes if it is not under 18-3500? Under what other rule or statute would you be entitled to the minutes?

Mr. Witt: Well, we have reference there, of course, to the general principles which now have been worked out in some of the Federal Courts which we discussed and presented and argued on the first trial, if the Court please. We have reference to the Pittsburgh Plate Glass case.

In other words, we think there is a particularized need shown in the case of Gardner. We have reference to the cases in the Court of Appeals for the 2nd Circuit and we have reference to some recent cases in the Court of Appeals for the District of Columbia Circuit.

The Court: Aren't they with reference to demand made under 18-3500?

Mr. Witt: No, as I understand them, if the Court please —I may be bewildered.

Mr. Taylor: I think possibly there is a lack of meeting of the minds here, because Mr. Witt made two different requests in the same motion there, but Your Honor will recall that throughout the last trial and this one also we have had really two different problems with respect to each of the major witnesses. One is what we are entitled to in the way of prior statements under 18 U.S.C. 3500 and the other is whether under the general principles laid down by the Supreme Court in Pittsburgh Plate Glass case and other subsequent cases we are entitled to Grand Jury minutes independently of 3500.

Indeed, I think the Court has specifically ruled that did not apply as to such as Grand Jury minutes so that has been settled in a different way.

[fol. 619] I don't want to take any words out of Mr. Witt's mouth. What I think he has done is made our regular motion that we made on Locke, Fikes, Moralez and Mason, just those four.

We have now made the motion for the Grand Jury minutes in the alternative under the Pittsburgh Plate Glass

case and similar decisions. He has an independent ground for asking for the Grand Jury minutes in the case of Gardner alone under 3500.

Mr. Witt: As usual, Mr. Taylor hasn't taken any words out of my mouth. He has put better words in. I think he has stated it very distinctly.

The Court: All right, first the motion to strike the testimony will be denied. Now, did you have something you wanted to address the Court on before we rule on the other motion, Mr. Maddrix?

Mr. Maddrix: I was going to suggest that it would be a good idea for counsel for the defense to get together. I do agree with Mr. Taylor that it has been settled that 3500 has no application to Grand Jury minutes at all. So that leaves the Pittsburgh Plate Glass case. And as I understand the situation here regarding Mr. Gardner, nothing has been said about Grand Jury minutes. There has been absolutely no showing of a particularized need.

The Court: All right. If a demand has been made under 18-3500, that demand is rejected by the Court and is denied. I am referring of course to a demand for the Grand Jury minutes.

Now, as to the motion to produce them on the basis that a need has been shown for the production to the defendants or an in camera inspection, the Court is of the opinion that no particularized need has been shown, and therefore, the motion to produce the Grand Jury minutes as made in the alternative is in both respects denied.

* * * * * * *

[fol. 645]

TRANSCRIPT OF PROCEEDINGS OF SEPTEMBER 10, 1963

* * * * * * *

RENEWAL OF MOTIONS, AFTER CROSS-EXAMINATION, TO PRODUCE GRAND JURY TESTIMONY OF GARDNER, COLLOQUY AND RULING THEREON

At The Bench.

Mr. Witt: If the Court please, at this time we renew our motion with respect to the production of the Grand Jury testimony of Gardner in 1956 in the alternative; in other words, the same motion we made at the close of this direct.

The Court: The Court is still of the opinion that the defendant has not shown a particularized need for the Grand Jury minutes, and the motion as made in the alternative is denied in both respects.

In Open Court.

Mr. MacDonald: May it please the Court, the Court will recall that yesterday we read certain pages out of Government's Exhibit 16 as marked for identification and offered in evidence pages 227 and a portion of 228, consisting of Mr. Van Camp's nominating speech for Ray Dennis for board member for District 3. We would like at this time to offer in evidence that portion of page 236 taken from the same proceedings, which consists of an acceptance speech by Mr. Dennis.

Mr. Taylor: No objection.

The Court: The exhibit will be received.

(Government's Exhibit No. 16 for identification was received in evidence.)

PART OF GOVERNMENT EXHIBIT NO. 16 READ TO THE JURY

Mr. MacDonald: I would like permission at this time to read this exhibit to the jury.

The Court: You may.

[fol. 646] Mr. MacDonald: This is a further portion of Government's Exhibit 16 taken from the official proceed-

ings of the 1945 Convention of the International Union of Mine, Mill and Smelter Workers, held in Chicago, Illinois at the Sheridan Hotel, September 12th to the 16th, inclusive, in the year 1949. The delegate Dennis is speaking: "Mr. President, sister and brother delegates, it is with a deep sense of responsibility that I wish to announce my acceptance of the nomination of board member in District 3. I feel greatly honored and I appreciate most highly the recognition that has been given to minority groups in our international union, particularly the Negro people. I look upon it as a recognition of the contribution made by my people and Mexican Americans and the other minority groups within this great organization, and I pledge myself to give my all as I have in the past in carrying on the policy and the dictates of the membership of this organization. Thank you."

Mr. Taylor: Your Honor, may we have the cautionary instruction?

The Court: Ladies and gentlemen of the jury, with reference to the exhibit which the Government just read into the record, you are instructed that the statements purportedly made by the defendant Dennis can be considered by you only in the case against the defendant Dennis and cannot be considered by you as evidence against any of the other defendants.

Mr. MacDonald: If the Court please, I would like permission to substitute photostatic copies of the pages read yesterday and today from Exhibit 16.

The Court: You may.

Offers in Evidence

Mr. MacDonald: If the Court please, I would like to have marked for identification as Government's Exhibit 17, thirty-one letters, both to and from the National Labor Relations Board, indicating compliance with the Taft-Hartley Act, for the period August 8, 1949 to June 12th, 1956. I now offer Government's Exhibit 17 as marked for identification in evidence.

Mr. Taylor: Your Honor, we have no objection to the receipt of the document. I should add that, of course, the defense is prepared to stipulate that the Mine-Mill achieved a state of compliance on whatever date the official records show.

[fol. 647] The Court: All right. The exhibits will be received in evidence.

(Government's Exhibit No. 17 for identification was received in evidence.)

Mr. MacDonald: If the Court please, I would like to further have Government exhibits marked for identification and I wonder if we couldn't mark these all together to save the Court time, consecutively that is.

The Court: Yes, you may mark them consecutively.

Mr. MacDonald: If the Court please, Government's Exhibit 18 for identification is a copy certified as true by the National Labor Relations Board of certain documents in their possession. I now offer Government's Exhibit 18 in evidence.

Mr. Taylor: No objection to the authenticity of the exhibit.

May I inquire of Mr. MacDonald whether this is offered to show use of the facilities of the board? Is that the purpose?

Mr. MacDonald: That is correct.

Mr. Taylor: No objection. The defense again is prepared to stipulate that after compliance, the union used these facilities.

The Court: Exhibit 18 will be received in evidence.

(Government's Exhibit No. 18 for identification was received in evidence.)

Mr. MacDonald: May I inquire of Mr. Taylor if he is willing to stipulate as to the parties involved?

Mr. Taylor: By the parties, you mean to the proceeding? Yes, whatever the records show.

Mr. MacDonald: Government's Exhibits 19, 20, 21 and 22

are again official copies of the National Labor Relations Board certified as true. I now offer those exhibits in evidence.

[fol. 648] Mr. Taylor: We have no objection.

The Court: Exhibits 19, 20, 21 and 22 are received in evidence.

(Government's Exhibits Nos. 19, 20, 21 and 22 for identification were received in evidence.)

Mr. MacDonald: If the Court please, Government's Exhibit 18 was offered for the purpose of showing the participation of the defendant, Mr. Skinner, in the use of the facilities of the NLRB. Government's Exhibit 19 is offered for the same purpose, that defendant Mr. Skinner used the facilities of the National Labor Relations Board. Government's Exhibit 20 is offered in evidence for the purpose of showing that defendant Mr. Van Camp and Raymond Dennis participated in using the facilities of the National Labor Relations Board. Government's Exhibit 21 is offered for the purpose of showing that defendant Charles Wilson participated in the use of the facilities of the National Labor Relations Board, and Government's Exhibit 22 is offered for the purpose of showing that defendant Irving Dichter participated in the use of the facilities of the National Labor Relations Board.

Mr. MacDonald: Now, if the Court please, I offer in evidence Government's Exhibit 23, which is a list of cases certified as having been taken from the files of the National Labor Relations Board, the Administrative Statistics Branch in Washington, cases in which the International Union of Mine, Mill and Smelter Workers used the facilities of the National Labor Relations Board, either as a complainant, a petitioner or an intervenor, during the period November 2, 1949 through November 16, 1956, and I will offer Government's Exhibit 23 in evidence.

Mr. Taylor: No objection, Your Honor.

The Court: Exhibit 22, which has been previously offered will be received in evidence. There was no objection to it. And, Exhibit 23 will also be received in evidence.

(Government's Exhibits No. 22 and 23 for identification were received in evidence.)

Mr. MacDonald: Thank you, Your Honor.

[fol. 649] Mr. Taylor: Your Honor, if I could just make one observation. We consented to the receipt of the exhibit to show participation of the union. We also agree it shows the participation of the defendant as participants, but it is not use of the Board by the defendant. It is use of the Board by the defendants by their participation in it.

* * * * * * *

[fol. 671]

TRANSCRIPT OF PROCEEDINGS OF SEPTEMBER 11, 1963

* * * * * * *

(The jury panel entered the court room and took their places in the jury box, and the following further proceedings ensued in the presence and hearing of the jury.)

COURT'S INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, before we proceed further this afternoon in the case, I wish to instruct you that from time to time during the presentation of the Government's case, you will recall that the Court has given you cautionary instructions with respect to limiting the application of evidence.

[fol. 672] That is to say, the Court has instructed you that you can only consider any alleged statement made by a particular defendant in connection with the case against him, and him alone; that such statement cannot be considered by you in any manner or to any degree against any of the other defendants, unless it was shown that any of the other defendants adopted the statement as their own or assented to or consented to what the particular defendant said.

Now, if it appears from the evidence to your satisfaction beyond a reasonable doubt that a conspiracy existed and

that a defendant was one of the members, then the acts knowingly done and the statements knowingly made after the formation of such conspiracy by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy.

Otherwise, any statement made or any action taken by one person may not be considered as evidence against any person who was not present at the time and assented thereto.

* * * * * * *

[fol. 771] Friday, September 13, 1963

Mrs. Eleanor Fernandez called as a witness by the defendants, being first duly sworn, on her oath testified as follows:

Direct examination.

By Mr. Taylor:

Q. Would you give your full name, please?
A. Eleanor Fernandez.
Q. Is it Miss or Mrs. Fernandez?
A. Mrs.
Q. Mrs. Fernandez, where do you live?
A. 1861 Tacos Way, Denver.
Q. How long have you lived in Denver about?
A. All my life.
Q. Now, Mrs. Fernandez, are you employed?
A. Yes.
Q. What is your occupation?
A. Head bookkeeper.

Q. Who are you employed by?

A. International Union of Mine, Mill and Smelter Workers.

Q. How long have you been employed by the Mine-Mill?

A. A little over ten years now.

Q. In what capacity were you first employed there?

A. I was first employed as a stenographer.

Q. How long were you a stenographer?

A. Well, let's see, until the end of October of '55. Then, November of '55 I went on as head bookkeeper.

Q. And you have been head bookkeeper ever since then?

A. Yes.

Q. Now, in your capacity as head bookkeeper of Mine-Mill, do you have custody of any records?

A. Yes, I do.

Q. Would you describe generally what those records consist of?

A. Cash disbursements, vouchers and payroll records.

Q. Would you state a little more explicitly what you mean by vouchers?

A. Expense vouchers submitted by any organizer, which include their expenses for the period.

Q. What sort of expenses would those be?

[fol. 772] A. Per diem, transportation and mileage and sometimes Tel. and Tel.

Q. You spoke of organizers. Do other officers submit vouchers?

A. Yes—and officers do.

Q. Now are those records that you have described, are those in your custody?

A. Yes, they are.

Q. And are those maintained and kept in the regular course of business of Mine-Mill?

A. Yes.

Q. Mrs. Fernandez, are you acquainted with the defendants in this case?

A. Yes.

Q. And are their vouchers for travel and per diem and other expenses among the records that you described?

A. Yes.

Q. And those are also maintained in the regular course of business?

A. Yes.

Q. Now, Mrs. Fernandez, have you had called to your attention the testimony given by the witness Locke with respect to the assigning and location of the defendant Dichter in the spring of 1948?

A. Yes.

Q. Have you examined the vouchers kept by you for the defendant Dichter for that period?

A. Yes.

Mr. Taylor: Your Honor, I have here five documents which the Clerk has already marked for identification as Defendants' Exhibits Q-1, 2, 3, 4, and 5. If you will bear with me, I would like to show them to the prosecution.

The Court: All right.

By Mr. Taylor:

Q. Mrs. Fernandez, I show you the first of these five documents and I am not asking you to say what it is, but do you know what it is?

A. Yes, I do.

Q. What is it?

A. It's an expense voucher.

Q. For whom?

A. Irving Dichter.

Mr. Taylor: Now, Your Honor, the defense would like to offer the exhibits marked Q-1 and identified by the witness in evidence.

Mr. Maddrix: Just one at a time or all of them?

Mr. Taylor: I am going to offer them one at a time.

Mr. Maddrix: May we approach the bench?

The Court: Yes.

[fol. 773] At The Bench

Mr. Maddrix: We understand that the proposed exhibit offered in evidence is a payroll or expense voucher of Irving Dichter and that the purpose is to show where he wasn't at a particular time. Am I right on that?

Mr. Taylor: That's correct.

Mr. Maddrix: Then we object to the introduction of those exhibits.

Mr. Taylor: Your Honor, this is basically the same question that arose with respect to the other vouchers on other occasion that arose with respect to the other vouchers on other occasions.

The Court: Yes.

Mr. Maddrix: That's right.

Mr. Taylor: And there was argument about it and Your Honor upheld the position. If Your Honor sustains it now, we will want to, at the proper time, make offer of proof.

The Court: All right. The objection will be sustained.

Mr. Taylor: Am I right in stating for the record that there is no objection based on authenticity here?

Mr. Maddrix: That is right. We accept the "Shop Book Rule." I think it's seventeen—

Mr. Taylor: Whatever it is.

Mr. Maddrix: Yes, whatever it is.

Mr. Taylor: You have no objection on authenticity?

Mr. Maddrix: No.

Mr. Taylor: So you won't need to ask the witness any more questions to identify it.

Mr. Maddrix: That's right.

[fol. 774] Mr. Taylor: We can make the offer of proof at the next recess.

The Court: Right.

In Open Court

Mr. Taylor: No further questions.

The Court: Cross examination, Mr. Maddrix?

Mr. Maddrix: No questions.

The Court: You are excused, Mrs. Fernandez.

* * * * * * *

[fol. 792] The Court: Mr. Taylor.

Mr. Taylor: Your Honor, at this time, in the recess, we would like to make the offer of proof with respect to the documents which were—one of which was offered at the time the witness Fernandez was on the stand earlier this morning, and the Government's objection to which was sustained by the Court.

Now, the five documents, which have been marked Defendants' Exhibits Q-1, 2, 3, 4, and 5—Q-1 was shown to the witness and identified as being the expense and travel voucher of Irving Dichter for the period April 1, to 15, 1948, and the other four vouchers are the ensuing vouchers for the same defendant for the period: Q-2, April 16 to 30; Q-3, May 1 to 15; Q-4, May 16 to 31; and, Q-5, June 1 to 15, 1948.

Now, these vouchers were offered in order to controvert the testimony of the prosecution witness, Ralph Locke, the first witness called in this case, who gave testimony about what was going on in Cleveland beginning around April 8 or 9, 1948.

The Court will recall that Locke testified that Travis came from Chicago to a meeting in Cleveland at or about that time, the first week in April, and after that meeting at which Travis had indicated that Fred Eckert, then the Board Member, would be discharged and Dichter would take over the office, that Locke went on to testify that from then on—that is from April 8 on, for about two months—that Dichter took over charge of the office and that meetings, staff meetings, were held frequently with one Joe Brandt, with Dichter and Joe Brandt present, over the course of the next two months, and, further, he said that Dichter remained for the most part in Cleveland with occasional trips back to New York, and he fixed the time rather precisely on cross as two months after April 8.

Offer of Proof With Respect to Defendants' Exhibits Nos. Q-1-Q-5, Inclusive, for Identification

[fol. 793] These vouchers, the first one which we offered and the others which were marked, cover that period, and

if admitted—and I take it, it can be understood that if the first one had been admitted, we would then have offered the other four?

The Court: That's understood, isn't it, Mr. Maddrix? You agree?

Mr. Maddrix: Yes, are they all Mr. Dichter's vouchers?

Mr. Taylor: They are all Mr. Dichter's, and they cover that period Locke testified about, and we would offer to prove by means of these vouchers, if received, that Dichter was, during the period April 1 to 15 in Cleveland, on April 7, 8, 9 and 15, and elsewhere on all other days, that he was in Cleveland on April 16 and 17, and thereafter in the month of April he was not in Cleveland at all. He was in New York and Chicago, that in the first half of May—that is May 1 to 15—Dichter was at all times in New York and at no time in Cleveland, that between May 16 and 31 he was in New York until May 24, in Cleveland for three days, 25, 26 and 27 of May and then went to Denver and that from June 1 to 15, he was in Denver, and in New York and at no time whatsoever in Cleveland.

Your Honor, that concludes the offer of proof with respect to the defendant Dichter. And, may I have a moment at table, please?

The Court: Yes.

(Counsel conferred.)

Mr. Taylor: That's all, Your Honor.

The Court: Any further comment, Mr. Maddrix, that you want to make? Do you have any further comment you want to make on the matter?

Mr. Maddrix: Nothing further.

The Court: All right, the offer of proof will be rejected and the original ruling of the Court will stand.

[fol. 794] Mr. Taylor: Yes, I take it that means the offer of proof remains in the record, but—

The Court: That is right. The effect of my statement is that I haven't changed my mind.

* * * * * * *

[fol. 1003]

TRANSCRIPT OF PROCEEDINGS—September 19, 1963

COURT'S INSTRUCTIONS TO THE JURY

The Court: Ladies and Gentlemen of the Jury, you have heard all of the evidence in the case and the summation of counsel, and it now becomes my duty as Judge to inform you what the law is and to instruct you on the law in this case.

While you are the sole judges of the disputed matters of fact and it lies with you and you alone to determine the ultimate issue of the guilt or innocence of each and all of the defendants, you are not permitted to act arbitrarily or capriciously, nor may you act in the light of your own individual notions of right and justice. Justice as it is administered in our courts is justice in accordance with law. That is the reason the Court is required to instruct the jury in the law applicable to the issues before the jury commences its deliberations.

As you are the sole judges of the fact, no one, not even the Court, may interfere with your honest discretion in this regard. There rests upon the Trial Judge the responsibility of stating the law correctly, and it is your duty to accept and apply the law as stated by the Court, even though the law so stated may differ from what you think the law is or ought to be.

You are to disregard and to remove from your minds entirely all of those matters which I have heretofore instructed you to disregard. Such matters will include anything said by counsel on either side in support of or in opposition to objections to the introduction of evidence and anything said by the Court in ruling upon objections, as well as evidence which has been received initially and which you are later instructed to disregard.

[fol. 1004] Lawyers have a right to raise objections and it is frequently their duty to do so. Nothing said for or against an objection or any ruling upon it should have any effect upon a juror's determination of the case. Colloquies between counsel or between the Court and counsel

are in the same category. These statements are not evidence and must in no way affect your judgment on the matters to be decided by you.

A further word on the subject of objections may be appropriate. Jurors, especially those who are serving as such for the first time, sometimes gain the impression that a Judge in ruling upon an objection is thereby indicating his opinion on the issues in the case. Such an impression is erroneous. In ruling upon objections, a Judge can give no consideration to the probable detrimental or favorable effect upon either side of an answer to the question to which an objection is made. In ruling upon objections, a Judge is concerned only with the admissibility under the rules of evidence of the subject matter about which inquiry is made. You must not infer from anything said by the Court during this course of this trial in ruling upon objections that the Court was indicating an opinion on the facts, nor are you to infer from anything said by the Court in these instructions or from the manner in which it may inadvertently be said that the Court is intending to indicate his opinion on the matters that lie exclusively within your province to determine. If your recollection as to any fact is different than as stated by the Court, it is your duty to follow your own recollection of the evidence, as you are the sole judges of the facts.

In your deliberations, you must also eliminate any consideration or bias or prejudice or sympathy, whether these considerations be based upon race, nationality or arise from any other cause. Neither prejudice nor sympathy has any place in a juror's consideration of the issues in this case. In no event are you to indulge in speculation or conjecture. As I have said to you, your determination of the facts must be based upon an objective examination and analysis of the evidence and the fair and reasonable inferences to be drawn therefrom and the law as contained in these instructions, unaffected by anything else.

Bear in mind, however, that an indictment is nothing but a formal method of accusing a defendant of a crime.

You are not to draw any inferences unfavorable to any or [fol. 1005] all of the defendants because of the fact that an indictment has been returned against them. It is not evidence of any kind against any or all of the defendants, and does not create any presumption or permit any inference of guilt.

In the indictment in this case reads as follows:

"The Grand Jury charges:

"That, beginning on or about the 15th day of June, 1949, and continuing up to and including the date of the return of this indictment, within the district of Colorado and elsewhere, Raymond Dennis, Irving Dichter, Harold Sanderson, Albert Skinner, Maurice E. Travis, Jesse R. Van Camp and Charles H. Wilson, the defendants herein, who were then and there officials and employees of the International Union of Mine, Mill and Smelter Workers, which was a labor organization within the meaning of the Labor Management Relations Act of 1947, 29 U.S.C. 152 (5), and who were then and there members of and affiliated with the Communist Party, did wilfully, knowingly and unlawfully combine, conspire and agree with each other, and with Arthur Bary, John Williamson, Gil Green and Fred Fine, co-conspirators but not defendants herein, and with other persons to the Grand Jurors unknown, to defraud the United States and an agency thereof, that is to say, the defendants conspired as aforesaid to fraudulently effectuate, for and on behalf of said Union and its constituent units, a compliance with Section 9(h) of the Labor Management Relations Act of 1947, 29 U.S.C. 159(h), by means of false and fraudulent statements and representations to be made and caused to be made by said defendants to the National Labor Relations Board, which was and is an agency of the United States, to fraudulently obtain and use for and on behalf of said Union and its constituent units the services and facilities of said Board without lawfully and in good faith qualifying said Union for the use of said services and said facilities under Section 9(h) of

said Act, and to impair, pervert, frustrate and defeat the proper, lawful and effective administration of said Act by the National Labor Relations Board.

"It was further part of the conspiracy that the said defendants would file and cause to be filed annually and at other times with the National Labor Relations Board affidavits commonly known as non-Communist affidavits, executed respectively by the defendants Raymond Dennis, [fol. 1006] Irving Dichter, Maurice E. Travis, Jesse R. Van Camp and Charles H. Wilson, who were officers of said Union, and also were members of and affiliated with the Communist Party, which said affidavits would falsely and fraudulently represent to said National Labor Relations Board that said Union officers were not members of and were not affiliated with the Communist Party, and that said Union officers would pretend to resign from their membership in the Communist Party and pretend to terminate their affiliation with said Party, but would in fact continue their membership in and affiliation with the same.

"It was further part of the conspiracy that the said defendants would by means aforesaid fraudulently induce the National Labor Relations Board to issue to said Union certificates of compliance with Section 9(h) of the aforesaid Act, and said Union would thus fraudulently obtain from said Board the authorization and right to make use of said Board's services and facilities, that is to say, the authorization and right to have the name of said Union appear on ballots in the elections conducted by said Board to determine the exclusive bargaining agent for groups and units of employees, the authorization and right to prosecute charges of unfair labor practices before said Board.

"It was further part of the conspiracy that the said defendants, well knowing the false and fraudulent character of the aforesaid affidavits and the fraudulent character of the said Union's compliance with Section 9(h) of said Act, would use the services and facilities of the National Labor Relations Board for and on behalf of said Union and its

constituent units, that is to say, they would file petitions requesting said Board to conduct elections for the purpose of determining the exclusive bargaining agents for groups and units of employees, would intervene in cases where such petitions were filed by other labor organizations, would appear at and participate in hearings conducted by said Board in respect to such petitions, would induce said Board to place the name of said union on the ballots in elections ordered and conducted by said Board, and would participate in said elections and conduct election campaigns for the purpose of inducing employees to vote for said union and winning said elections, so that said Board would certify said Union as the exclusive bargaining agent for said employees; that said defendants would file complaints with said Board relating to unfair labor practices, and would appear and participate in hearings conducted by said Board in respect to the same.

[fol. 1007] "Overt Acts.

"The Grand Jury further charges, that in furtherance of the aforesaid conspiracy and to accomplish the objects thereof, the defendants committed numerous overt acts, among which were the following:

"1. On or about July 19, 1949, at Chicago, Illinois, Jesse R. Van Camp, Charles H. Wilson and Harold Sanderson attended and participated in a meeting of the International Executive Board of said Union.

"2. On or about August 8, 1949, at Washington, D.C., Maurice E. Travis, Jesse R. Van Camp and Charles H. Wilson filed false affidavits with the National Labor Relations Board.

"3. On or about December 21, 1949 at Cuyahoga County, Ohio, Raymond Dennis executed a false affidavit.

"4. On or about May 19, 1950, at Danville, Illinois, Raymond Dennis and Jesse R. Van Camp signed an agreement for an election before the National Labor Relations Board.

"6. On or about December 15, 1950, at Washington, D.C., Maurice E. Travis and Raymond Dennis filed false affidavits with the National Labor Relations Board.

"7. On or about April 18, 1951, at Salt Lake City, Utah, Albert Skinner appeared at and participated in a hearing conducted by the National Labor Relations Board.

"10. On or about November 19, 1952, at Cuyahoga County, Ohio, Raymond Dennis executed a false affidavit.

"11. On or about December 3, 1952, at Denver, Colorado, Charles H. Wilson executed a false affidavit and caused the same to be mailed to the National Labor Relations Board at Washington, D.C.

"12. On or about November 6, 1953, at Denver, Colorado, Maurice E. Travis executed a false affidavit and caused the same to be mailed to the National Labor Relations Board at Washington, D.C.

[fol. 1008] "14. On or about February 15, 1954, at Butte, Montana, Albert Skinner appeared at and participated in a hearing conducted by the National Labor Relations Board.

"15. On or about March 24, 1954, at Kingston, Tennessee, Charles H. Wilson appeared at and participated in a hearing conducted by the National Labor Relations Board.

"17. On or about October 19, 1954, at Denver, Colorado, Maurice E. Travis, Albert Pezzati, Raymond Dennis, Asbury Howard, Chase Powers and Alton Lawrence executed false affidavits, and each of said false affidavits were sworn to before Harold Sanderson, who acted as Notary Public.

"18. On or about February 24, 1955, at New York, New York, Irving Dichter executed a false affidavit.

"19. On or about June 23, 1955, at Denver, Colorado, Albert Pezzati executed a false affidavit, and swore to the same before Harold Sanderson, who acted as Notary Public.

"All in violation of Section 371, Title 18, U.S.C.

"A True Bill," and signed "Charles Louis Sayre, Foreman. Donald E. Kelley, United States Attorney."

Now, the charge, ladies and gentlemen, in this indictment is that the defendants from on or about June 15, 1949, and continuing up to and including the date of the return of the indictment on November 16, 1956, did wilfully, knowingly and unlawfully conspire to defraud the United States and an agency thereof; that is to say, the defendants conspired to fraudulently effectuate for and on behalf of the International Union of Mine, Mill and Smelter Workers and its constituent units a compliance with Section 9(h), Labor Management Relations Act of 1947, by means of filing false and fraudulent non-Communist affidavits with the National Labor Relations Board, and by means of such false affidavits to fraudulently obtain and use for and on behalf of said union and its constituent units the facilities and services of the Board, without lawfully and in good faith qualifying said union for use of such services and facilities, and to impair, pervert, frustrate and defeat the proper, lawful and effective administration of the Labor Management Relations Act. The defendants are not charged with the substantive offense of filing non-Communist affidavits with the National Labor Relations Board, but rather with the offense of conspiring to file them. To warrant a conviction of these defendants, it is not necessary that the Government prove that false non-Communist [fol. 1009] affidavits were actually filed by each of the defendants. The offense is completed when it is shown beyond a reasonable doubt that the defendants conspired unlawfully, wilfully and knowingly to file false non-Communist affidavits with the National Labor Relations Board, and that at least one overt act was done in furtherance of the conspiracy.

In the indictment which I have read to you, there is set forth the means by which it is charged that the defendants agreed to effectuate the purposes of the conspiracy. It is

not necessary that the Government prove all of the alleged means were agreed to be used, but it is essential as a part of the proof that the prosecution establish beyond a reasonable doubt that one or more of the means were agreed to be used for the purpose of accomplishing the objectives of the conspiracy.

The defendants on trial in entering pleas to this indictment have stated that they are not guilty of the accusation or accusations against them. By the pleas of not guilty the defendants deny every material portion of the accusation or the averment or charge against them. They deny that there was any conspiracy in this case. They deny that they were members of or participated in any conspiracy or cooperated in or committed any acts in furtherance of the conspiracy.

The defendants here stand clothed with provisions of the law to the effect they are presumed to be innocent of the offense charged. The presumption of innocence attends and protects the defendants throughout the trial until the Government has overcome that presumption by evidence which convinces you of their guilt beyond the existence of a reasonable doubt. The burden of proof is upon the Government to prove to your satisfaction beyond a reasonable doubt that the defendants are guilty of the offense charged in this indictment. By that I do not mean that it is necessary that evidence be presented which convinces you of their guilt beyond all possible doubt, because everything which relates to human affairs is open to some possible doubt. Reasonable doubt means a substantial doubt arising on the evidence or lack of evidence, and such a doubt as would cause a reasonable man or woman to halt and hestitate before you acted in the more serious matters of your own concern.

[fol. 1010] Now, the relevant part of the statute under which this indictment is drawn is as follows:

18 United States Code, Section 371: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any

agency thereof, in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be punished as provided by law."

Now, in addition to the statutory definition which I have just read to you, a conspiracy may be further defined as a combination of two or more persons by concerted action to accomplish a criminal or an unlawful purpose or to accomplish a lawful purpose by unlawful means with the commission of an overt act by one or more of the conspirators to further an objective or purpose of the conspiracy. The gist of the offense is the unlawful combination or agreement to violate the law. A conspiracy is a partnership in a criminal purpose. The crime of conspiracy is complete when one of the conspirators commits an overt act in furtherance thereof.

The conspiracy charged in this case is a conspiracy to defraud the United States or an agency thereof by filing false non-Communist affidavits with the National Labor Relations Board by one or more of the defendants in this case and not by any other person.

It is not necessary in order to constitute a conspiracy that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme or that they should directly, by word or writing, state what the unlawful scheme was to be and the details of the plan or means by which the unlawful scheme was to be made effective. It is sufficient if two or more persons in any manner or through any contrivance impliedly or tacitly come to a mutual understanding to accomplish a common, unlawful design, knowing its object. In other words, where an unlawful end is sought to be effected and two or more persons, actuated by the common purpose of accomplishing that end, knowingly work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although his part therein may be a subordinate one or is executed at a remote distance from the other conspirators. All con- [fol. 1011] spirators need not have originally conceived

the conspiracy or participated in its inception. Those who come in later with knowledge of the aims and purposes of the conspiracy and cooperate in the common effort to obtain the unlawful results become parties thereto. The conspiracy is not ended as long as the evidence shows an intention to continue it. Each alleged conspirator who was an agent of the others at some time during the life of the conspiracy remains an agent during all of its existence, except that a conspirator has a right to withdrawn from the execution of the conspiracy, but it requires affirmative, effective action thus to withdraw and terminate liability in the conspiracy. However, if a conspirator does not withdraw from the conspiracy by affirmative and effective action, he is chargeable with the acts and declarations of all other conspirators, whether committed before or after he joins the conspiracy. So you need not be concerned as to when a person joined the conspiracy, as long as you find he joined the conspiracy with knowledge of its aims and objectives. The agreement may be a matter of inference *deducted* from the acts of the persons accused done in pursuance of an apparent criminal purpose.

The overt act which is required to complete the offense of conspiracy is any act done openly which may be the subject of direct evidence. An overt act need not of itself be criminal or unlawful. It may be an act, which, considered separately from the conspiracy, is innocent and lawful. But, it must, however, be an act done in furtherance of the conspiracy and one which tends to promote or further the accomplishment of the unlawful plan or agreement.

With respect to the alleged overt acts, may I say to you that it is not necessary for the Government to prove all of said acts. If all the other elements of the conspiracy are established beyond a reasonable doubt, then to complete the crime it is necessary only that it be shown by the same degree of proof that at least one overt act in furtherance of the conspiracy was committed by one of the conspirators. There must also be considered the period of the statute of limitations. The defendants could not be

convicted of conspiracy unless the conspiracy continued and an overt act as I have just defined to you was committed within the period of the statute of limitations. The [fol. 1012] statute of limitations is the period of five years immediately preceding the filing of the indictment, which took place on November 16, 1956. Thus, the prosecution must prove by the required degree of proof that the conspiracy continued and that one of the overt acts alleged in the indictment was committed after November 16, 1951.

In your consideration of this case, you will first determine whether or not there was an unlawful conspiracy as charged in the indictment. A conspiracy to commit a criminal offense is usually characterized by secrecy or deception, rendering detection difficult. It is because of this that a conspiracy to commit a criminal act is, as I have said to you, an offense distinct from the crime or activity which is the subject of the unlawful combination. The law regards it as a danger to the public when two or more persons conspire to do something unlawful, because the aggregation of numbers together with the unlawful purpose becomes a formidable, disadvantageous aspect to the public welfare. On the other hand, the mere association of persons in a group without any plotting to subvert the law and solely for the purpose of disseminating or propagating ideas is a necessary part of a free society, and is entirely lawful, as is the peaceful pursuit of study and discussion in the realm of ideas.

It will, therefore, be your first task to determine whether there was a conspiracy to commit the offense against the law which I have referred to as defrauding the United States or an agency thereof, and by so conspiring to unlawfully and wilfully and knowingly make, use and file and cause to be made, used and filed with the National Labor Relations Board false affidavits of non-Communist union officers as charged in the indictment.

If upon a consideration of all the evidence relating to the existence of the alleged conspiracy you entertain a reasonable doubt of its existence, you should conclude your

deliberations at that point and return a verdict of not guilty as to all of the defendants. However, if you are satisfied beyond a reasonable doubt that there was such conspiracy, you will then proceed to consider whether the defendants or some of them were members of it.

Now, in considering whether a particular defendant was a member of the alleged conspiracy, you must do so with- [fol. 1013] out regard to and independently of the actions and declarations of others. Although the charge is that of collective action of a group as members of a conspiracy, guilt is personal and individual. Therefore, participation of a defendant in a conspiracy must be determined from evidence relating to the particular defendant's own acts, his own declarations and his own conduct in connection with the actions and conduct of others. The question to be answered as to each defendant separately considered is whether he knowingly became a member of a conspiracy.

If it is established by the requisite degree of proof that a defendant was a member of a conspiracy, then any act or declaration of any other co-conspirator, whether named as a defendant or not, which was made or done in furtherance thereof, would be binding upon all of the members of the conspiracy, even though such declarations or acts were made or done in the absence of a particular defendant and without previous authorization or subsequent ratification by him. Once a conspiracy is formed, each member thereof becomes the agent of every other member in all things said and done in promoting or furthering the common unlawful purpose. However, declarations made by a member of the conspiracy which are not in furtherance thereof are not binding upon the other members of the conspiracy, even though they may incriminate the person making them.

Mere membership in the Communist Party or affiliation with the Communist Party or filing of false non-Communist affidavits with the National Labor Relations Board or the use of the facilities of the Board is not in itself sufficient to show that a defendant was a member of a

conspiracy. Mere association with members of the Communist Party or presence at meetings attended by members of the Communist Party is not evidence of participation in the conspiracy charged in the indictment. You cannot find any defendant guilty solely on the basis of evidence that he associated with other defendants who were members of the Communist Party or attended meetings with such other defendants. While you may not find any defendant to be a member of the conspiracy solely on the basis of affiliation with or membership in the Communist Party, you may consider evidence of membership or affiliation together with other evidence relating to a defendant's conduct, knowledge, activities and intent, and if, on the basis of all of the evidence in the case, you are convinced beyond a reasonable doubt that a defendant knowingly and wilfully participated in the conspiracy, you [fol. 1014] may find such defendant to have been a member of it. However, if you entertain a reasonable doubt that one or more of the defendants, with knowledge of its objects, wilfully joined the conspiracy, then it will be your duty to acquit such defendant or defendants.

If all these elements of the crime have been proved beyond a reasonable doubt, it will be necessary for you to determine also as to each defendant separately considered whether he participated in the conspiracy with the specific intent to make, use and file and causing to be made, used and filed with the National Labor Relations Board false affidavits of non-Communist union officers. In other words, mere knowledge of the existence of a conspiracy is not sufficient to establish guilt of any defendant. In addition, you must find beyond a reasonable doubt that a defendant acted—or a defendant affirmatively acted—in furtherance of such conspiracy with the specific intent to achieve the object of the conspiracy.

Some of the defendants in this case, namely, Harold Sanderson and Albert Skinner, did not hold positions or offices in the union that required them to file non-Communist affidavits with the National Labor Relations Board

in order to qualify the union to use the facilities of said Board. Such persons may, nevertheless, be members of the conspiracy as charged in the indictment under certain circumstances. It is not necessary that they themselves should have filed or should have been required to file non-Communist affidavits.

In determining whether or not these two defendants, or either of them, were members of the alleged conspiracy during the time charged, you should make your determination in accordance with the same standards and instructions as are given you with respect to the other defendants herein.

In this case the prosecution has presented evidence that the International Union of Mine, Mill and Smelter Workers adopted a policy of non-compliance with the Taft-Hartley Act from 1947 to the summer of 1949, and thereafter of compliance with the Act, and that the Communist Party likewise advocated a policy of compliance. Now, such evidence does not in and of itself establish that any of the defendants were members of the conspiracy charged in the indictment.

[fol. 1015] The word "knowingly" as used in this indictment means with knowledge of the facts.

"Wilfully" means by a design with a set purpose. It means knowingly and with a bad heart and a bad intent. It is not enough if all that is shown is that the defendant was ignorant, uneducated, stupid or careless. The word "wilful" often denotes an act intentional or knowingly or voluntarily as distinguished from accidental, but when used in a criminal statute it generally means an act done with a bad purpose and without justifiable excuse. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by a careless disregard of whether or not one has the right to do it, to so act.

It is not always possible to prove purpose and intent by direct evidence, for purpose and intent are within the

mind of man, and in determining purpose and intent you may look to all surrounding circumstances. You are to remember that it is presumed in law that one intends the natural and probable consequences of his voluntary acts unless circumstances are such as indicate an absence of intent.

Section 159(h), Title 29, United States Code, which is the Labor Management Relations Act of 1947, commonly known as the Taft-Hartley Act, provides as follows:

"No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under Subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under Subsection (b) of Section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve month period by each officer of such labor organization, and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such Party."

In this case, the Government charges that there are several documents containing false statements. These documents are affidavits of non-Communist union officers executed by several of the defendants.

[fol. 1016] The Labor Management Relations Act of 1947, commonly referred to as the Taft-Hartley Act, a portion of which I have just read to you, provides, among other things, that before a labor union can have certain rights under that law, each officer of that union must execute and file with the Labor Relations Board an affidavit that he is not a member of the Communist Party or affiliated with such Party.

The law does not compel the filing of such affidavits. Thus, there is nothing wrong or illegal with not complying with the Taft-Hartley Act in this respect. The law merely

provides that the National Labor Relations Board shall not take certain actions relative to labor unions unless certain things are done by the labor unions requesting such action. One of those things the union has to do to obtain such action is filing of these co-called non-Communist affidavits by officers of the union.

In this case, counsel have stipulated—that is just the legal term for agreed—that defendants Raymond Dennis, Irving Dichter, Maurice Travis, Charles Wilson and Jesse R. Van Camp executed non-Communist affidavits for the years in question. They have stipulated that said defendants mailed the affidavits or caused them to be mailed to the National Labor Relations Board in Washington, and they were received by said Board.

The Government has established and the defendants do not deny the facilities of the National Labor Relations Board have been utilized by the International Union of Mine, Mill and Smelter Workers on numerous occasions between December 21, 1949 and August 11, 1955, and the Court has ruled as a matter of law that the National Labor Relations Board is an agency of the United States under the provisions of 18 United States Code, Section 371, that being the section of law under which the indictment was returned.

You will recall that the words "members," or "member" rather, and "affiliated", these two words, "member" and "affiliated," were used in Subsection 159(h) of the statute which provides for the filing of the non-Communist affidavits with the National Labor Relations Board as follows:

"That he is not a member of the Communist Party or affiliated with such Party," and so forth.

[fol. 1017] Now, it is important to keep in mind the charge in the indictment that the defendants conspired to defraud the United States and an agency thereof by means of fraudulent statements and representations to be made or caused to be made to the National Labor Relations Board. You will recall that it is alleged in the indictment that as

overt acts Dennis, Dichter, Travis, Wilson and Van Camp filed or caused to be filed false non-Communist affidavits. Your attention is called to the non-Communist affidavits which are in evidence in this case. Now, the body of each such affidavit contains three numbered paragraphs as follows:

"1. I am a responsible officer of the union named below.

"2. I am not a member of the Communist Party or affiliated with such Party.

"3. I do not believe in and I am not a member of nor do I support any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

Now, you are instructed, ladies and gentlemen, that the last paragraph which I just read is not involved in this case in any respect. Paragraph Number 3 of the affidavit is not involved in this case in any respect. These defendants are not charged in this indictment with any offense that pertains to that Paragraph 3 of the respective affidavits. The charge in the indictment refers to the other two paragraphs of the affidavit, so you should not consider Paragraph 3 of the affidavits in connection with the case against any of the respective defendants.

It is essential, therefore, to know what the words "membership" and "affiliation" mean. Membership in the Communist Party is a formal relation between an individual and the Communist Party. To constitute membership the individual must desire to belong to the organization and there must be a recognition by the organization that it considers him a member. Furthermore, membership imports adherence to the objectives of the organization.

These are questions of fact which you are to determine from all of the evidence in the case, and, as with all ques-[fol. 1018] tions of fact, you must find this beyond a reasonable doubt, based on all the evidence.

Membership or lack of membership in the Communist Party may be established by direct as well as by circum-

stantial evidence. In determining whether or not a particular defendant was a member of the Communist Party at the times alleged in the indictment, you may take into consideration whether the defendant has made himself subject to the discipline of the Communist Party in any form whatsoever, has executed orders, plans or directives of any kind from the Communist Party, has acted as an agent, courier, messenger, correspondent, organizer or in any other capacity in behalf of the Communist Party, has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the organization, has been accepted to his knowledge as an officer or member of the Communist Party, or as one to be called upon for services by other officers or members of the organization, has written, spoken or in any other way communicated by signal, semaphore or sign or any form of communication orders, directives or plans of the Communist Party, has prepared documents, pamphlets, leaflets, books or any other types of publication in behalf of the objectives or purposes of the organization, has mailed, shipped, circulated, distributed, delivered or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization, has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the Communist Party or to anyone else in behalf of the objectives of the organization, has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner or to any degree the plans, designs, objectives or purposes of the organization, has in any way participated in the activities, plans, actions, objectives or purposes of the organization. These are some of the indicia of Communist Party membership, but you are not limited solely to those I have enumerated.

As sole arbiters of the facts, it is your duty to consider all of the evidence, either direct or circumstantial, which bears on the question of whether or not the defendants were members of the Communist Party on the dates alleged in the indictment.

[fol. 1019] "Affiliation" as used in the indictment is not the same as membership. The word "affiliation" as used in the indictment means a relationship short of and less than membership in the Communist Party, but more than that of a mere sympathy for the aims and objectives of the Communist Party. A person may be found to be affiliated with an organization even though not a member when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely or depend upon him to cooperate with it and work for its benefit for an indefinite period upon a fairly permanent basis. Affiliation includes an element of dependability on which the organization can rely, which, though not equivalent to membership duty does rest upon a course of conduct that could not be arbitrarily ended without giving a reasonable cause for the charge of a breach of good faith.

Whether or not a defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you ladies and gentlemen are to determine from all the evidence in the case. Affiliation or lack of affiliation in the Communist Party may be established by direct as well as circumstantial evidence, and unless you find from all the evidence that the person who signed a particular affidavit was either a member of the Communist Party or affiliated with such Party on the date of the particular affidavit, you cannot conclude that that affidavit was false as to the denial of membership in or affiliation with the Communist Party.

The Labor Management Relations Act of 1947, also referred to as I have previously stated as the Taft-Hartley Act, at all times pertinent hereto was the law of this land. The fact that one or more of the defendants may have been shown to express disagreement with the Taft-Hartley Act cannot in and of itself be construed to mean that such defendant or defendants participated in the conspiracy charged herein. The right to express disagreement with

the wisdom of a law is a right granted to everybody by the Congress of the United States and his exercise of that right may not be construed by you as evidence bearing upon his guilt or innocence. The wisdom of enacting such a law is a matter solely for Congress.

While the jury is the sole judge of the facts, a Federal Judge is privileged, if he deems it necessary, to comment upon the evidence or to review the evidence without com- [fol. 1020] ment in order to assist the jury in its deliberations. I shall pursue neither course because I think a substantial review of the evidence or extended comment thereon would be of little assistance to you and would serve only to further tax your patience and add unnecessarily to the burden of your task.

The evidence has been referred to at length in the summation of counsel and to the extent that counsel on either side have recited the evidence accurately or correctly you should accept their references to it. However, if the evidence as referred to by the Government or defendants does not square with your recollection of it, you are to disregard the statements made by counsel in relation thereto.

There are two kinds of evidence, direct and circumstantial. They are of equal value in the law. Direct evidence is that sort of evidence by which a fact is proven directly and without inference from other facts and it is usually given by witnesses who saw, heard or otherwise observed some particular fact or occurrence.

Circumstantial evidence in criminal cases is the proof of such facts and circumstances connected with or surrounding the commission of a crime charged as tend to show the guilt or innocence of the parties charged. It is that sort of evidence by which an inference of an unproved fact is drawn from the existence of proven facts.

An example of circumstantial evidence, when you retire to go to bed at night, you look outside and see the ground is clear, but when you wake up in the morning you find the

ground is covered by a blanket of snow. Now, you did not see it snow, but from the fact that you find a blanket of snow on the ground the next day you have a right to infer as a circumstance that it snowed during the night.

You are instructed that where guilt depends on circumstantial evidence as in any other criminal case the burden rests upon the Government to prove its case beyond a reasonable doubt. Evidence of facts that are as consistent with innocence as they are with guilt is insufficient to warrant a conviction. In order to warrant a conviction on circumstantial evidence, all of the circumstances must be consistent with each other, consistent with the proposition that the accused is guilty, and inconsistent with the proposition that he is innocent.

[fol. 1021] You are not called upon to determine the guilt or innocence of any of the alleged co-conspirators not named as defendants in the indictment. No charge against them of violating criminal laws in the United States is before you for determination. Your only task is to determine whether these defendants or any of them are guilty as charged. If the evidence points to the guilt of any person or persons not on trial in this case, you are in no sense to consider such evidence except as it bears upon the question of the guilt or innocence of the defendants on trial or any of them in accordance with these instructions.

Members of the jury, it is not your function to pass upon the relative merits of Communism, Capitalism or any political party. Neither patriotism nor any other consideration could justify you in applying to this case any standards of proof less strict than you would apply in a trial of persons on any other charge.

Each defendant has offered evidence in this case as to his good character for truth and veracity. Now, in this connection, the law is that a defendant is entitled to put in issue his good character. Good character of the defendant is evidence and a circumstance that you should take into consideration, together with all the other facts and circumstances, in determining the guilt or innocence of the defen-

dant on the offense charged. While testimony of good character is not a defense to a crime, such character testimony may alone create a reasonable doubt, although, without it, the other evidence would be convincing. That is for you to determine. If you find from the evidence in this case beyond a reasonable doubt that the defendant did commit the offense as charged in the indictment, it will be your duty to convict him, notwithstanding his good character.

In arriving at your verdict, ladies and gentlemen, you are to follow the law as the Court gives it to you, but you are the sole judges of the facts, and in this regard the Court has no supervision or control over you. It is your duty to find the facts and to search for the truth. You are the sole judges of credibility of the witnesses and the weight that should be given to their testimony. Take into consideration the demeanor of the witness on the witness stand, his [fol. 1022] sincerity or lack of sincerity, his interest if any in the outcome or concern over the outcome of the controversy. Take into consideration whether the witness has given any previous oral or written statements inconsistent with his testimony in Court or which did not state the whole truth concerning matters as to which he was interrogated when the statement was given, and whether his testimony in Court has been inconsistent. Take into consideration all of the circumstances that may shed light on the truth or falsity of the testimony that was given by the witness.

Now, during the trial of this case, the testimony of William Mason was read to you from the transcript of the previous trial. This was authorized because of Mason's death prior to the present trial. Such testimony is entitled to the same consideration and insofar as possible is to be judged as to credibility and weight by the jury in the same way as if the witness had been present.

As you have observed, none of the defendants took the witness stand. That fact must not prejudice you against any defendant. The statutes of the United States provide, and I am quoting:

"In the trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts-martial and courts of inquiry in any state, district, possession or territory the person charged shall at his own request be a competent witness. His failure to make such a request shall not create any presumption against him."

You must, therefore, determine the guilt or innocence of the defendants and each of them on the basis of the evidence received in the case and not by what has not been given in evidence. As the statute says, the failure of the defendant in a criminal case to testify creates no presumption against him. You must not permit the fact that a defendant has not testified to weigh in any degree against him. That fact should not enter into the discussions or deliberations of the jury in any manner.

In weighing the testimony given by former members of the Communist Party, you should consider whether the circumstances of their membership or their leaving the Party might have given rise to some hostility or prejudice against the Communist Party or against these defendants which might affect the accuracy or truthfulness of their testimony. [fol. 1023] The evidence shows that certain of the Government's witnesses were in times past engaged by the Government as confidential informants to join the Communist Party and make reports to the Federal Bureau of Investigation of such facts as they learned during such association, and they were paid considerable sums of money for their long service while so engaged for procuring evidence, including among other things with respect to the activities of the defendants. In weighing the testimony of such witnesses you should scrutinize their testimony with greater care and caution than if they were not so engaged. In this connection, it should be borne in mind it is sometimes necessary in proving the commission of certain crimes for the Government to rely upon evidence furnished by these so-called informers. All of the factors which might act as an

inducement to a witness to deviate from the truth or to color testimony should be considered by you. However, you should not infer that the existence of any of these factors or any one of them in relation to some of the witnesses is of itself sufficient to discredit such witness' testimony. A witness who is a former member of the Communist Party or an informer or who by reason of interest, hostility, bias or hope of reward might be induced to give false testimony may nevertheless testify accurately and truthfully. If you find that such witness has testified truthfully, then such testimony is as good as the truth testified from any other source. What the fact is in this regard as to all the witnesses for both the Government and the defendants is for you to determine in the light of all the circumstances and in accordance with your experience and best judgment.

Consideration should also be given to a witness' intelligence and the opportunity that a witness had to see and hear the things about which testimony was given. You should also consider the apparent ability of a witness to remember and correctly report matters about which he testified.

You are the sole judges, as I have said, of the credibility of the witnesses and of the weight to be given the testimony of each witness. In determining the weight to be given the testimony of the witnesses, you should take into consideration, in addition to the matters I have already related, their means of knowledge, the strength of memory and opportunities for observation os shown by the evidence in the case; the reasonableness or unreasonableness of their statements; the consistency or inconsistently of their testimony; the mo-[fol. 1024] tives actuating them as far as such motives appear from the evidence in the case; the fact, if it be a fact, they have been contradicted by other evidence in the case; their bias, prejudice or interest if any has been shown; their manner or demeanor from the witness stand and all of the facts and circumstances shown by the evidence which in your judgment affect the credit due to them respectively.

If, after considering all of the evidence, you find that any witness has wilfully or corruptly testified falsely to any fact material to the issues of this case, you have a right to disregard the whole or any part of his or her testimony.

Unless I have otherwise indicated, ladies and gentlemen, each instruction should be considered by you as referring separately and individually to each defendant on trial.

In the event of a verdict of guilty, punishment is a matter that lies solely within the discretion of the trial judge. It is no concern of yours. You will, therefore, give no consideration to the matter of punishment in your deliberations.

Now, to summarize, when you go to your jury room, you will first determine whether during the time mentioned in the indictment, that is on or about June 15, 1949, and thereafter until November 16, 1956, the defendants did conspire to unlawfully, wilfully and knowingly make, use and file, and cause to be made, used and filed with the National Labor Relations Board false affidavits of non-Communist union officers, well knowing that the statements and representations to be made in said affidavits that the affiants therein were not members of or affiliated with the Communist Party of the United States of America were false. If you entertain a reasonable doubt as to the existence of the conspiracy as alleged in the indictment, it will be your duty to acquit all of the defendants. If, however, you are convinced beyond a reasonable doubt that there was a conspiracy as charged in the indictment, then you will take up the case of each defendant separately and determine in accordance with the instructions that I have heretofore given you whether he knowingly became a member of it. One may become a member of a conspiracy without full knowledge of all of the details of the unlawful plan or all the means to be used. However, a person who has no knowledge of the conspiracy, but happens to act in a way which furthers the object of it, does not thereby become a conspirator.

[fol. 1025] Now, as I have said, have heretofore said, to you, the question to be answered as to each defendant, is,

did he with knowledge of the purposes of the conspiracy cooperate in the common effort to accomplish its purpose?

As to each defendant, you will be required to determine whether he had the specific intent to achieve the object of the conspiracy. If you entertain a reasonable doubt as to a defendant's knowledge of the unlawful purposes of the conspiracy or a reasonable doubt that the defendant had the specific intent alleged, you should acquit such defendant. However, if after a fair and full consideration of all of the evidence you are convinced beyond a reasonable doubt of the guilt of all or the guilt of some of the defendants, as to those you have no reasonable doubt about you should return a verdict of guilty.

You are also required to find beyond a reasonable doubt that one or more overt acts was committed in furtherance of the conspiracy and at least one overt act was committed after November 16, 1951. If you fail to so find, it is your duty to acquit the defendants.

If you care to examine any of the exhibits which have been received in evidence, let your wishes be known to the jury bailiff, who will have you in charge, and he will obtain the exhibits from the Clerk.

Now, in this regard, there is one other matter I wish to mention. Counsel, during the trial, have referred to the transcript of evidence, which has been prepared from day to day by the reporter. The law is I cannot permit you to have that transcript in the jury room. In cases where there is a daily transcript, it is quite common to have a request from the jury for a copy of the transcript, but under the law which binds me, I cannot let you have it. Also, under the practice in this jurisdiction, the instructions are oral and you cannot have a copy of the instructions.

When you go to your jury room, you should elect one of your members as foreman. The one so elected foreman will preside over your deliberations, but without any greater power or authority than any other member of the panel, except that I charge the one so elected foreman with the responsibility of confining the discussions in the jury room

to a consideration of the evidence, the inferences to be drawn therefrom and these instructions, and nothing else.

[fol. 1026] It will require the concurrence of all twelve jurors to arrive at the verdict you shall render as to each defendant. Remember what I have said to you about the opening statements and closing arguments of counsel not being part of the evidence in the case. The opening statements and arguments of counsel and remarks of the Court and counsel are not evidence. The arguments, statements and objections made by the counsel to the Court or to each other and the rulings and orders made by the Court and remarks made by the Court during the trial and not directed to you should not be considered by you in arriving at your verdict.

The manner in which a juror approaches his duty is important. It is seldom helpful for a juror to take a positive position at the outset and immediately proclaim his or her determination to vote a certain way. When this is done, individual pride of opinion becomes involved and a juror who asserts such an attitude may later, hesitate to recede from his or her announced position, even though shown to be incorrect. As jurors, you should consult with one another and deliberate with a view of reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but doing so only after an impartial consideration of the evidence with your fellow jurors. Do not hesitate to re-examine your views and change your opinion, if convinced it is erroneous, but do not surrender your honest convictions as to the weight or effect of evidence or the inferences to be drawn therefrom solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

The form of verdict which I shall submit to you reads as follows: It first has the caption, the name of the case, and then the verdict part reads, "We, the jury in the above entitled case, upon our oath, do say, we find the defendant Raymond Dennis—" Then there is a blank line in the form of verdict, and you will insert in that blank space either the

word "guilty" or "not guilty," whichever you find, and the same with respect to the other six defendants, whose names appear on the form of verdict and opposite whose names also appear the blank space.

Now, when you have reached your verdict, which as I have said to you must be unanimous, the foreman and he alone signs the verdict, then the signed verdict and the exhibits which you take to your jury room if you want them will be returned by you to the Court when you report.

* * * * * * *

[fol. 1031] OBJECTIONS TO THE INSTRUCTIONS

Then, if I may run down the others, they won't take too long, I hope. I will be following the pages in the appellate record. Let me say generally, will it be sufficient for us to object to all portions of the charge that are inconsistent with our requests, so I won't have to run down each one?

[fol. 1032] I am prepared to run down each one, but in the interest of saving time, will that general objection be sufficient?

The Court: Well, it would as far as I am concerned, but this is more for your record on appeal.

* * * * * * *

[fol. 1033] Mr. Taylor: We renew our exception to the charge insofar as it refuses to give the instructions that we have requested and have been denied by the Court at all portions of the charge which reflect that failure. We except to it.

* * * * * * *

[fol. 1120]

Defendants' Requested Instruction
No. 6

All evidence relating to any oral admission or incriminatory statement claimed to have been made by a defendant outside of Court should be considered with great caution and weighed with great care. Furthermore, no such

admission or incriminatory statement is entitled to any weight without independent evidence that what the defendant admitted actually took place. I also instruct you that one admission or incriminatory statement does not corroborate another.

9/19/63 Tendered by deft. and refused by the Court.

Alfred A. Arraj, U.S. District Judge.

Defendant's Requested Instruction
No. 7

Membership in or affiliation with the Communist Party is not evidence of membership in the conspiracy charged [fol. 1121] in the indictment. You cannot find any defendant guilty on the ground that he was a member of or affiliated with the Communist Party, or even that he filed a false non-Communist affidavit. You cannot find any defendant guilty unless you are satisfied beyond a reasonable doubt that he, with full knowledge that his own affidavit or the affidavits of the other defendants would be false, if and when filed, conspired with other defendants to bring about the filing of such false affidavits with intent to defraud the United States.

9/19/63 Tendered by deft. and refused by the Court.

Alfred A. Arraj, U.S. District Judge.

* * * * * * *

[fol. 1135]

In United States District Court

Government's Exhibit No. 1

RESOLUTION

Since the last meeting of the Casting Council of the IUMM&SW, your Chairman and the Staff have spent a considerable portion of their time combatting raiding activities of other unions.

Despite our best efforts, and the efforts of those loyal Local Union officers and members who have assisted, I must report that raiding now constitutes a serious threat to the Casting Division of this Union.

The overwhelming majority of our membership is loyal to this Union, which has achieved the third highest wage scale in American industry, exceeded only by the coal miners and makers of rubber tires. But those unions and employers who seek to disrupt our Union received an important tactical advantage through the Taft-Hartley Act, which prevents our Union from receiving a place on the ballot in NLRB elections, resulting from our boycotting of the National Labor Relations Board. This handicap puts a heavy burden on our Union in combatting raiding. Had all unions, and especially CIO unions, adhered to the boycott of the NLRB, changes could undoubtedly have been effected, but unfortunately many unions departed from their original decision to boycott.

Your Chairman believes that an immediate cessation of raiding by other CIO unions must be achieved or the Union must place itself in the position to enable its getting on the ballot in NLRB elections. To that end, I recommend:

1. That President Clark be requested to begin immediate discussion with President Murray and other CIO officers to end raiding of Mine-Mill;

2. If unsuccessful, that President Clark call an immediate special meeting of the International Executive Board for the purpose of considering filing the necessary information to enable Mine Mill to be a full participant in any NLRB elections.

uopwa 87
April 8, 1948

[fol. 1136]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT B

International Union of
Mine, Mill and Smelter Workers
Suite 1299 Adams-Franklin Building

No 12500

CHICAGO, ILL., April 20 19 48

PAY TO THE ORDER OF Ralph Locke $ 201.60

I.U.OF M.M.&S.W. 2 0 1 60 CTS

International Union of Mine, Mill and Smelter Workers

BY _____ PRESIDENT
COUNTERSIGNED

_____ SEC'Y-TREAS.

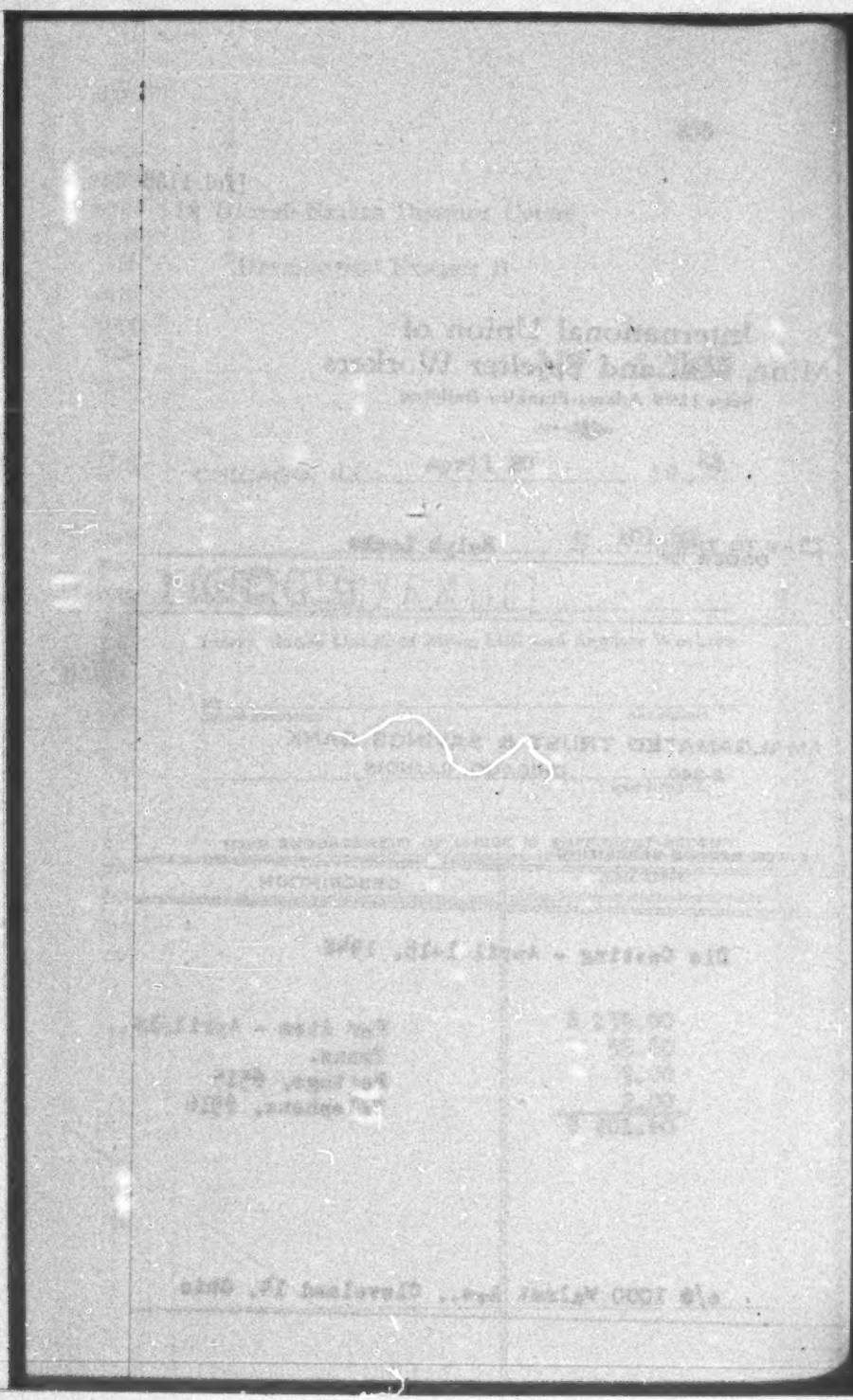
AMALGAMATED TRUST & SAVINGS BANK
2-340 CHICAGO, ILLINOIS

YOUR ENDORSEMENT OF CHECK IS SUFFICIENT RECEIPT

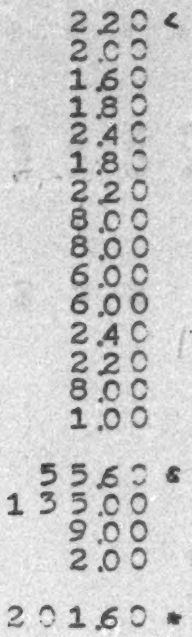
DETACH BEFORE DEPOSITING

DESCRIPTION	AMOUNT
Die Casting - April 1-15, 1948	
Per diem - April 1-15.	$ 135.00
Trans.	55.60
Postage, #515	9.00
Telephone, #516	2.00
	$ 201.60

c/o 1000 Walnut Ave., Cleveland 14, Ohio



[fol. 1137]


220 <
200
160
180
240
180
220
800
800
600
600
240
220
800
100
5560 &
13500
900
200
20160 *

EXPENSE ACCOUNT

District - Casting Division — Period Ending April 15, 1948

1	Detroit area		55 mi	2.20	9.00
2	"		50	2.00	"
3	"		40	1.60	"
4	"		45	1.80	"
5	"		60	2.40	"
6	"		45	1.80	"
7	"		55	2.20	"
8	Detroit	To Cleveland		8.00	"
9	Cleveland	To Detroit		8.00	"
10	Detroit	To Kalamazoo		6.00	"
11	Kalamazoo	To Detroit		5.00	"
12	Detroit area		60	2.40	"
13	"		55	2.20	"
14	Detroit	To Cleveland		8.00	"
15	Cleveland area		25	1.00	"
				55.60	135.00

[fol 1138]

APR 15 1948

Expense Allow. 135.00
Transportation 55.60
Postage 9.00
Telephone 2.00

(Telephone:
Local calls in Det. 1.25
Cleve. to Detroit .75)

355

Ralph Locke

Ralph Locke, 1000 Walnut Ave., Cleve.

Approved by Ken Eckert

O.K. T.

[fol. 1139]

DETROIT, MICH. GRATIOT STA. MAR 17 1948

[fol. 1140]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT C

International Union of
Mine, Mill and Smelter Workers
Suite 1299 Adams-Franklin Building

No 12639

CHICAGO, ILL., May 5 19 46

PAY TO THE ORDER OF Ralph Locke $ 163.96

I.U. OF M.M.&S.W. $163.96 CTS

International Union of Mine, Mill and Smelter Workers

BY
COUNTERSIGNED PRESIDENT

SEC'Y-TREAS.

AMALGAMATED TRUST & SAVINGS BANK
2-340 CHICAGO, ILLINOIS

DETACH BEFORE DEPOSITING YOUR ENDORSEMENT OF CHECK IS SUFFICIENT RECEIPT

DESCRIPTION	AMOUNT
Die Casting - April 16-30, 1946	
Per diem - April 16-30,	$ 133.00
Trans.	28.96
	$ 163.96

1000 Walnut Ave., Cleveland 14, Ohio

[fol. 1141]

```
    30 <
    40
    44
    75
    80
   400
   632
   222
    36
    44
    55
    98
    62
    35

   724 *

   724 <
   724
   724
   724

  2896 *
 13500

 16396 *
```

District No. CASTING Period Ending MARCH 30TH

DATE	TRANSPORTATION FROM	TO	AMOUNT	EXPENSE ALLOWANCE
~~4-15~~	CLEVELAND AREA	CLEVELAND AREA	~~44 mi~~	~~$ 9.00~~
4-16	" "	" "	30 mi	9.00
4-17			40 mi	9.00
4-18			44 mi	9.00
4-19			75 mi	9.00
4-20			80 "	9.00
4-21			40 "	9.00
4-22				9.00
4-23			63 "	9.00
4-24			22 "	9.00
4-25			36 "	9.00
4-26			44 "	9.00
4-27			55 "	9.00
4-28			98 "	9.00
4-29			62 "	9.00
4-30			35 "	9.00
		TOTAL	728 ~~$28.96~~	$135.00

RECEIVED 1948 CLEVELAND

[fol. 1142]

NOTE—All accounts must be rendered semi-monthly to the Secretary-Treasurer. Pay periods are from the 1st to 15th, inclusive, and from 16th to 30th, or 31st, inclusive.

Expense accounts must be filled in each day.

Receipts for all expenditures listed must be sent in with expense account.

If receipts are not received, no payment will be made.

Only ordinary expenses will be reimbursed.

No receipts are necessary for transportation by auto (4c a mile).

Telephone and telegraph bills must be listed in detail on back of this sheet. If this is not done, the bills will not be paid. Phone calls from pay booths must be so listed.

Expense allowance will not be allowed unless employee is away from home station over night.

No staff member may incur expenses beyond those allowed by International Union.

Fill in columns at right.

Signature Ralph Locke

Where Check Should be Sent 1000 Walnut ave. Cleveland Ohio

Approved by [illegible]

(Over)

AMOUNT DUE	
1. Salary	
2. Expense Allowance	$135.00
3. Transportation	28.96
4. Hotel Bills and Bulletins	
5. Meetings Promotion Expense	
6. Postage	
7. Telephone—Telegraph	
8. Miscellaneous	
TOTAL	$163.96

DEDUCTIONS	
1. Social Security—State Unemp. Tax	
2. Advances	
3. War Bonds	
4. American-Allied War Relief	
5. Government Tax	
6. Group Insurance	
TOTAL DEDUCTIONS	

359

TELEPHONE CALLS

DATE	FROM	TO	REASON FOR THE CALL	AMOUNT

[fol. 1144]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT D

International Union of
Mine, Mill and Smelter Workers
Suite 1299 Adams-Franklin Building

No 12774

CHICAGO, ILL., May 15 19 45

PAY TO THE ORDER OF Ralph Locke $ 168.25

Exactly 168 and 25 cts

International Union of Mine, Mill and Smelter Workers

BY John Clark PRESIDENT
COUNTERSIGNED

SEC'Y-TREAS.

AMALGAMATED TRUST & SAVINGS BANK
2-340 CHICAGO, ILLINOIS

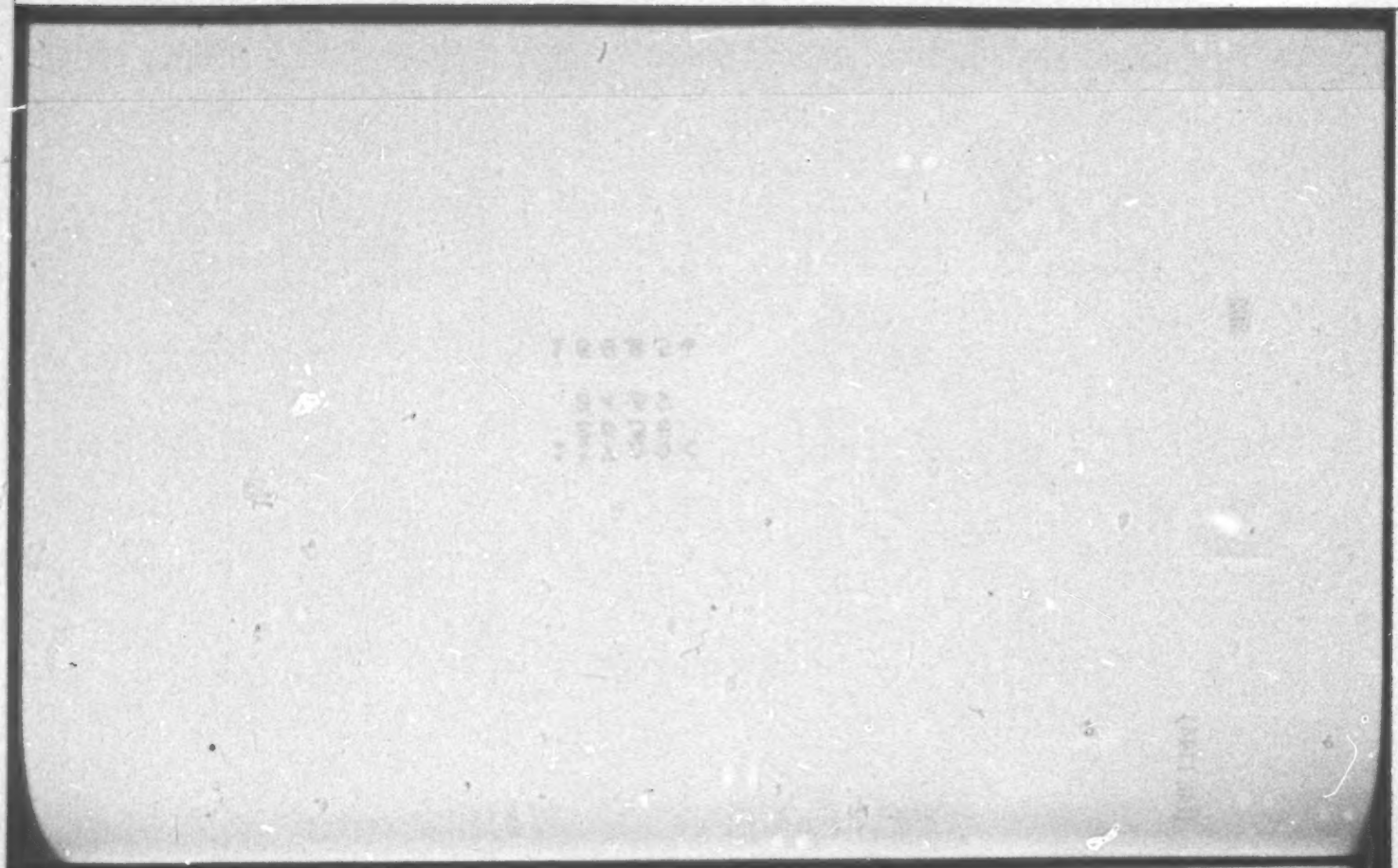
DETACH BEFORE DEPOSITING YOUR ENDORSEMENT OF CHECK IS SUFFICIENT RECEIPT

DESCRIPTION	AMOUNT
Die Casting- May 1-15, 1945	
Per diem - May 1-13,	$ 117.00
Trans.	26.56
Telephone, #516	24.69
	$168 .25

office

[fol. 1145]

11700<
2636
2469
16885*



Since I will be in Chicago on
Thursday please hold my check for
me and I will pick it up at the
International Office.

Thank you.

Ralph Locke

ORIGINAL

EXPENSE ACCOUNT

International Union Mine, Mill and Smelter Workers

District No. Casting

Period Ending May 15th

DATE	TRANSPORTATION FROM	TO	AMOUNT	EXPENSE ALLOWANCE
5-1-48	Cleveland Area	Cleveland Area	15 mi	9 00
5-2-48	" "	"	50 mi	9 00
5-3-48	" "	"	20 mi	9 00
5-4-48	" "	"	31 mi	9 00
5-5-48	" "	"	22 mi	9 00
5-6-48	" "	"	47 mi	9 00
5-7-48	" "	" "	40 mi	9 00
5-8-48	" "	" "	12 mi	9 00
5-9-48	Cleveland "	Erie Pa. and return	250 mi	9 00
5-10-48	Cleveland Area	Cleveland Area	22 mi	9 00
5-11-48	" "	" "		9 00
5-12-48	" "	" "	31 mi	9 00
5-13-48	" "	" "	48 mi	9 00
5-14-48	" "	" "	40 mi	—
5-15-48	" "	" "	36 mi	—
		TOTAL	664 mi	$117 00

$26.56

RECEIVED MAY 17 1948 [illegible]

NOTE—All accounts must be rendered semi-monthly to the Secretary-Treasurer. Pay periods are from the 1st to 15th, inclusive, and from 16th to 30th, or 31st, inclusive.

Expense accounts must be filled in each day.

Receipts for all expenditures listed must be sent in with expense account.

If receipts are not received, no payment will be made.

Only ordinary expenses will be reimbursed.

No receipts are necessary for transportation by auto (4c a mile).

Telephone and telegraph bills must be listed in detail on back of this sheet. If this is not done, the bills will not be paid. Phone calls from pay booths must be so listed.

Expense allowance will not be allowed unless employee is away from home station over night.

No staff member may incur expenses beyond those allowed by International Union.

Fill in columns at right.

Signature Ralph Snake

Where Check Should be Sent 1000 Walnut Ave Cleveland Ohio

Approved by Kenneth F. Sickt

(Over)

618

AMOUNT DUE	
1. Salary	
2. Expense Allowance	117 00
3. Transportation	26 56
4. Hand Bills and Bulletins	
5. Meetings Promotion Expense	
6. Postage	
7. Telephone--Telegraph	2 4.68
8. Miscellaneous	
TOTAL	161 24

DEDUCTIONS	
1. Social Security--State Unemp. Tax	
2. Advances	
3. War Bonds	
4. American-Allied War Relief	
5. Government Tax	
6. Group Insurance	
TOTAL DEDUCTIONS	

364 [fol. 1147]

TELEPHONE CALLS

DATE	FROM	TO	REASON FOR THE CALL	AMOUNT

L. D. Calla
Jr. 2330

4/12 - [illegible]	80	T
4/19 - M. J. [illegible]	130	
4/24 - Del.	115	
4/30 - Stark Aug	590	
4/2 - Chgo	185	
4/27 L. [illegible]	635	
4/28 Del.	90	
"	150	
	19.75	S
Tax	4.91	
	24.69	T

Received
5/15/41
L. N.

[fol. 1150]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT E

International Union of
Mine, Mill and Smelter Workers
Suite 1299 Adams-Franklin Building

No 12984

CHICAGO, ILL., June 8 19 48

PAY TO THE ORDER OF Ralph Locke $ 68.45

EXACTLY $68 AND 45 CTS

International Union of Mine, Mill and Smelter Workers

BY _____ PRESIDENT
COUNTERSIGNED

_____ SEC'Y-TREAS.

AMALGAMATED TRUST & SAVINGS BANK
2-340 CHICAGO, ILLINOIS

DETACH BEFORE DEPOSITING — YOUR ENDORSEMENT OF CHECK IS SUFFICIENT RECEIPT

DESCRIPTION	AMOUNT
Die Casting - May 16-31, 1948	
Per diem - May 21-23,	$ 27.00
Trans.	41.45
	$ 68.45

1000 Walnut Ave., Cleveland 14, Ohio

```
  188<
  144
  240
 1645
  180
  220
  240
  180
  200
  240
  200
  160
  220

 4149s
 2700

 6849*
```

ORIGINAL

EXPENSE ACCOUNT

International Union Mine, Mill and Smelter Workers

District No. Casting Division — Period Ending May 31, 1948

DATE	TRANSPORTATION FROM	TO		AMOUNT	EXPENSE ALLOWANCE
~~15~~	~~Cleveland area~~	~~50~~		~~2.00~~	
16	Cleveland area	25		1.00	
17	"	45		1.80	
18	"	36		1.44	
19	"	60		2.40	
20	Cleveland	Chicago			9.00
21	Chicago area			16.45	9.00
22	Chicago "				9.00
23	Cleveland area	45		1.80	
24	"	55		2.20	
25	"	60		2.40	
26	"	45		1.30	
27	"	50		2.00	
28	"	60		2.40	
29	"	50		2.00	
30	"	40		1.60	
31	"	TOTAL	55	2.20	
			626	41.49	27.00

RECEIVED JUN 8 1948

NOTE—All accounts must be rendered semi-monthly to the Secretary-Treasurer. Pay periods are from the 1st to 15th, inclusive, and from 16th to 30th, or 31st, inclusive.

Expense accounts must be filled in each day.

Receipts for all expenditures listed must be sent in with expense account. If receipts are not received, no payment will be made.

Only ordinary expenses will be reimbursed.

No receipts are necessary for transportation by auto (4c a mile.)

Telephone and telegraph bills must be listed in detail on back of this sheet. If this is not done, the bills will not be paid. Phone calls from pay booths must be so listed.

Expense allowance will not be allowed unless employee is away from home station over night.

No staff member may incur expenses beyond those allowed by International Union.

Fill in columns at right.

Signature Ralph Locke

Where Check Should be Sent 1000 Walnut Avenue Cleveland 14, O.

Approved by

(Over)

AMOUNT DUE	
1. Salary	
2. Expense Allowance	27.00
3. Transportation	41.49
4. Hand Bills and Bulletins	
5. Meetings Promotion Expense	
6. Postage	
7. Telephone—Telegraph	
8. Miscellaneous	
TOTAL	68.49
DEDUCTIONS	
1. Social Security—State Unemp. Tax	
2. Advances	
3. War Bonds	
4. American-Allied War Relief	
5. Government Tax	
6. Group Insurance	
TOTAL DEDUCTIONS	

[fol. 1152]

369

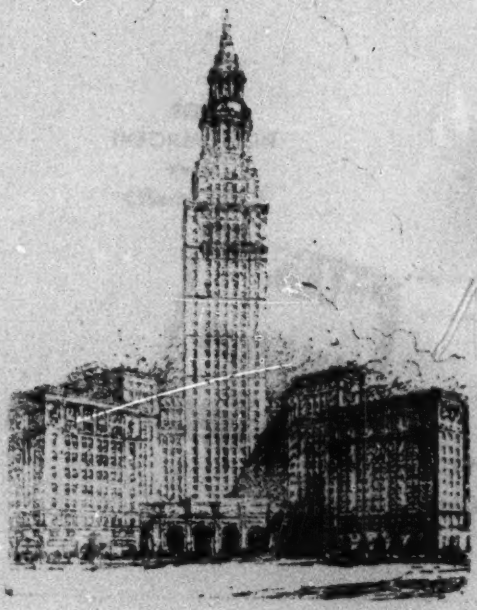
TELEPHONE CALLS

DATE	FROM	TO	REASON FOR THE CALL	AMOUNT
			TOTAL	

NOTE: This must correspond with amount shown on receipted bill, less calls from Pay Booth

TELEGRAMS

DATE	FROM	TO	REASON FOR WIRE	AMOUNT
			TOTAL	



CLEVELAND UNION TERMINAL

M_____

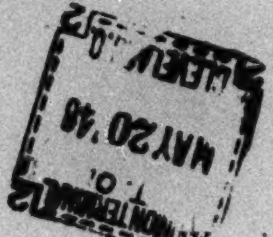
_____

_____

Arranged by_____

FOR
INFORMATION
Phone
CHerry 8200

FOR
RESERVATIONS
Phone
MAin 2300



FARE 1645

Railroad

Pullman

Total

We wish you a pleasant journey
and extend cordial thanks for your patronage

[fol. 1156]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' EXHIBIT G

International Union of
Mine, Mill and Smelter Workers
Suite 1299 Adams-Franklin Building

No 13459

CHICAGO, ILL., August 3 1948

PAY TO THE ORDER OF Ralph Locke $ 87.80

I.U. OF M.M.&S.W. $87 AND 80 CTS

International Union of Mine, Mill and Smelter Workers

BY _____ PRESIDENT
COUNTERSIGNED

_____ SEC'Y-TREAS.

AMALGAMATED TRUST & SAVINGS BANK
2-340 CHICAGO, ILLINOIS

DETACH BEFORE DEPOSITING

YOUR ENDORSEMENT OF CHECK IS SUFFICIENT RECEIPT

DESCRIPTION	AMOUNT
Die Casting - July 16-31, 1948	
Per diem - July 17,18,26,27	$ 36.00
Trans.	51.80
	$ 87.80

1000 Walnut Ave., Cleveland 14, Ohio

2.04 <
4.50
2.72
7.40
1.84
2.12
2.20
4.00
2.20
2.08
6.56
1.88
5.60
2.24
2.40
1.92

51.50 s
36.00

87.50 *

ORIGINAL

EXPENSE ACCOUNT
International Union Mine, Mill and Smelter Workers

District No. casting

Period Ending July 31

DATE	TRANSPORTATION FROM	TO	AMOUNT	EXPENSE ALLOWANCE
July 16	Cleveland Area	51 mi.	$ 2.04	
" 17	Cleveland to Sandusky	115 "	4.60	$ 9.00
" 18	Sandusky to Toledo	68 "	2.72	9.00
" 19	Toledo to Claveland	185 "	7.40	
" 20	Cleveland Area	46 "	1.84	
" 21	Cleveland Area	53 "	2.12	
" 22	Cleveland Area	55 "	2.20	
" 23	Cleveland Area Cleveland to Medina & ret.	100 "	4.00	
" 24	Cleveland Area	55 "	2.20	
" 25	Cleveland Area	52 "	2.08	
" 26	Cleveland Area Cleveland to Erie	164 "	6.56	9.00
" 27	Erie Area	47 "	1.88	9.00
" 28	Erie to Cleveland & Cleveland Area	140 "	5.60	
" 29	Cleveland Area	56 "	2.24	
" 30	Cleveland Area	60 "	2.40	
" 31	Cleveland Area	48 "	1.92	
		TOTAL	51.80	$36.00

RECEIVED
JUL 31 1948
INTERNATIONAL U. M. & S. W.

[fol. 1158]

NOTE—All accounts must be rendered semi-monthly to the Secretary-Treasurer. Pay periods are from the 1st to 15th, inclusive, and from 16th to 30th, or 31st, inclusive.

Expense accounts must be filled in each day.

Receipts for all expenditures listed must be sent in with expense account.

If receipts are not received, no payment will be made.

Only ordinary expenses will be reimbursed.

No receipts are necessary for transportation by auto (4c a mile).

Telephone and telegraph bills must be listed in detail on back of this sheet. If this is not done, the bills will not be paid. Phone calls from pay booths must be so listed.

Expense allowance will not be allowed unless employee is away from home station over night.

No staff member may incur expenses beyond those allowed by International Union.

Fill in columns at right.

Signature Ralph Locke

Where Check Should be Sent

Approved by Irving Potter

(Over)

618

AMOUNT DUE	
1. Salary	
2. Expense Allowance	36.00
3. Transportation	51.80
4. Hand Bills and Bulletins	
5. Meetings Promotion Expense	
6. Postage	
7. Telephone—Telegraph	(21.84
8. Miscellaneous	
TOTAL	109.64

DEDUCTIONS	
1. Social Security—State Unemp. Tax	
2. Advances	
3. War Bonds	
4. American-Allied War Relief	
5. Government Tax	
6. Group Insurance	
TOTAL DEDUCTIONS	

375

TELEPHONE CALLS

DATE	FROM	TO	REASON FOR THE CALL	AMOUNT

Ralph Locke

Phone

6-1-48 ERIE	50
6-9-48 ERIE	50
6-11-48 DET.	50
6-15-48 ERIE	35
6-16-48 WINDHAM	50
6-21-48 DET	60
6-24-48 ERIE	90
6-25-48 ERIE	35
6-[illegible]-48 ERIE	70
6-[illegible]-48 ERIE	180
6-[illegible]-48 [illegible]	70
	740
TAX	1.85
	9.25

[fol. 1161]

9.25
12.59
21.84

ORIGINAL

EXPENSE ACCOUNT

International Union Mine, Mill and Smelter Workers

APR 1 1948

District No. Casting

Period Ending April 15, 1948

DATE	TRANSPORTATION FROM	TO	AMOUNT	EXPENSE ALLOWANCE
1	New York	Vicinity	1.60	
2	"	"	1.55	
3	"	"	1.75	
4				
5	"	"	1.90	
6	"	"	1.60	
7	New York - Garwood - Cleveland		31.75 ✓	9.00
8	Cleveland	"		9.00
9	"	New York en route	28.75 ✓	9.00
10	New York	Vicinity	1.80	
11				
12	"	Bridgeport	2.95	9.00
13	Bridgeport	New York	2.10	
14	New York	Cleveland	29.75 ✓	9.00
15	Cleveland	vicinity		9.00
		TOTAL	105.48	54.00

NOTE—All accounts must be rendered semi-monthly to the Secretary-Treasurer. Pay periods are from the 1st to 15th, inclusive, and from 16th to 30th, or 31st, inclusive.

Expense accounts must be filled in each day.

Receipts for all expenditures listed must be sent in with expense account.

If receipts are not received, no payment will be made.

Only ordinary expenses will be reimbursed.

No receipts are necessary for transportation by auto (4c a mile).

Telephone and telegraph bills must be listed in detail on back of this sheet. If this is not done, the bills will not be paid. Phone calls from pay booths must be so listed.

Expense allowance will not be allowed unless employee is away from home station over night.

No staff member may incur expenses beyond those allowed by International Union.

Fill in columns at right.

Signature Irving Rhulstone

Where Check Should be Sent 160 W. 177 St N.Y.C.

Approved by Ken. Lobit subject to inspection of accompanying Vouchers

#7621

AMOUNT DUE	
1. Salary	
2. Expense Allowance	54.00 ✓
3. Transportation	105.48
4. Hand Bills and Bulletins	
5. Meetings Promotion Expense	
6. Postage	
7. Telephone—Telegraph	
8. Miscellaneous	
TOTAL	159.48

DEDUCTIONS	
1. Social Security—State Unemp. Tax	
2. Advances	
3. War Bonds	
4. American-Allied War Relief	
5. Government Tax	
6. Group Insurance	
TOTAL DEDUCTIONS	

9-1 13) X

In United States District Court
From Defendants' Exhibit Q-1

[fol. 1162]

379

ORIGINAL

EXPENSE ACCOUNT

International Union Mine, Mill and Smelter Workers

District No. Casting Division

Period Ending 4/30/40

DATE	TRANSPORTATION FROM	TO	AMOUNT	EXPENSE ALLOWANCE
4/16	Cleveland	vicinity		9.00
4/17	Cleveland	New York	29.15	
4/19	New York	vicinity	1.40	
4/20	New York	vicinity	1.40	
4/21	New York	vicinity	1.85	
4/22	New York	"	1.90	
4/23	New York	Newark-return	2.40	
4/24	New York	vicinity	1.60	
4/25	New York	Chicago	51.39	9.00
4/26	Chicago			9.00
4/27	"			9.00
4/28	"			9.00
4/29	"			9.00
4/30	Chicago	New York-vicinity	1.40	
		TOTAL	93.89	54.00

MAY 3 1940

NOTE—All accounts must be rendered semi-monthly to the Secretary-Treasurer. Pay periods are from the 1st to 15th, inclusive, and from 16th to 30th, or 31st, inclusive.

Expense accounts must be filled in each day.

Receipts for all expenditures listed must be sent in with expense account.

If receipts are not received, no payment will be made.

Only ordinary expenses will be reimbursed.

No receipts are necessary for transportation by auto (4c a mile).

Telephone and telegraph bills must be listed in detail on back of this sheet. If this is not done, the bills will not be paid. Phone calls from pay booths must be so listed.

Expense allowance will not be allowed unless employee is away from home station over night.

No staff member may incur expenses beyond those allowed by International Union.

Fill in columns at right.

Signature Irving Richter

Where Check Should be Sent 667 W. 177 Street- NYC

Approved by Ken Eckert

(Over)

AMOUNT DUE	
1. Salary	
2. Expense Allowance	54.00
3. Transportation	93.89
4. Hand Bills and Bulletins	
5. Meetings Promotion Expense	
6. Postage	
7. Telephone—Telegraph	4.06
8. Miscellaneous	
TOTAL	151.95

DEDUCTIONS	
1. Social Security—State Unemp. Tax	
2. Advances	100.00
3. War Bonds	
4. American-Allied War Relief	
5. Government Tax	
6. Group Insurance	
TOTAL DEDUCTIONS	

7621

9-2 (3)

In United States District Court
From Defendants' Exhibit Q-2
[fol. 1163]

380

ORIGINAL

EXPENSE ACCOUNT

International Union Mine, Mill and Smelter Workers

District No. Casting Division Period Ending May 15, 1948

DATE	TRANSPORTATION FROM	TO	AMOUNT	EXPENSE ALLOWANCE
5/1	New York	vicinity	1.80	
5/2	"	Garwood-return	2.40	
5/3	New York	Garwood-return	2.40	
5/4	New York	vicinity	1.75	
5/5	New York	vicinity	1.80	
5/6	New York	Garwood	2.40	
5/7	New York	vicinity	1.90	
5/8	New York	vicinity	1.85	
5/9	New York	vicinity	1.70	
5/10	New York	vicinity	1.65	
5/11	New York	vicinity	1.80	
5/12	New York	Garwood-return	2.40	
5/13	New York	vicinity	1.75	
5/14	New York	Irvington-return	2.10	
5/15	New York	vicinity	1.80	
		TOTAL	29.50	

RECEIVED JUN 8 1948

In United States District Court
From Defendants' Exhibit Q-3

[fol. 1164]

NOTE—All accounts must be rendered semi-monthly to the Secretary-Treasurer. Pay periods are from the 1st to 15th, inclusive, and from 16th to 30th, or 31st, inclusive.

Expense accounts must be filled in each day.

Receipts for all expenditures listed must be sent in with expense account.

If receipts are not received, no payment will be made.

Only ordinary expenses will be reimbursed.

No receipts are necessary for transportation by auto (4c a mile).

Telephone and telegraph bills must be listed in detail on back of this sheet. If this is not done, the bills will not be paid. Phone calls from pay booths must be so listed.

Expense allowance will not be allowed unless employee is away from home station over night.

No staff member may incur expenses beyond those allowed by International Union.

Fill in columns at right.

Signature Irving Chichester

Where Check Should be Sent 667 W. 177th St/ NYC

Approved by [illegible]

(Over)

AMOUNT DUE	
1. Salary	
2. Expense Allowance	
3. Transportation	29.50
4. Hand Bills and Bulletins	
5. Meetings Promotion Expense	
6. Postage	
7. Telephone—Telegraph	12.19
8. Miscellaneous	
TOTAL	41.69
DEDUCTIONS	
1. Social Security—State Unemp. Tax	
2. Advances	
3. War Bonds	
4. American-Allied War Relief	
5. Government Tax	
6. Group Insurance	
TOTAL DEDUCTIONS	

7621

Q-3 (4)

381

District No. Central Division Period Ending May 31, 48

TRANSPORTATION

DATE	FROM	TO	AMOUNT	EXPENSE ALLOWANCE
5/16	New York vicinity	Garwood, return	3.20	
5/17	New York vicinity		1.80	
5/18	New York vicinity	Garwood, return	3.00	
5/19	New York vicinity		1.70	
5/20	New York	Garwood	2.80	
5/21	New York, Garwood	Irvington, return	4.10	
5/22	New York vicinity		1.90	
5/23	New York vicinity		1.70	
5/24	New York	Cleveland	2.30	9.00
5/25	Cleveland vicinity		1.05	9.00
5/26	Cleveland vicinity		1.70	9.00
5/27	Cleveland, Chicago, vicinity Denver		3.85	9.00
5/28	Denver vicinity		1.00	9.00
5/29	Denver vicinity		1.40	9.00
5/30	Denver vicinity		1.70	9.00
5/31	Denver vicinity pullman ~~exair~~ space		10.10	9.00
		TOTAL	53.10	72.00

NOTE—All accounts must be rendered semi-monthly to the Secretary-Treasurer. Pay periods are from the 1st to 15th, inclusive, and from 16th to 30th, or 31st, inclusive.

Expense accounts must be filled in each day.

Receipts for all expenditures listed must be sent in with expense account.

If receipts are not received, no payment will be made.

Only ordinary expenses will be reimbursed.

No receipts are necessary for transportation by auto (4c a mile).

Telephone and telegraph bills must be listed in detail on back of this sheet. If this is not done, the bills will not be paid. Phone calls from pay booths must be so listed.

Expense allowance will not be allowed unless employee is away from home station over night.

No staff member may incur expenses beyond those allowed by International Union.

Fill in columns at right.

Signature Patrick Whelton

Where Check Should be Sent 642 N. 177 St. N.Y.C.

Approved by [signature]

(Over)

7621

AMOUNT DUE	
1. Salary	
2. Expense Allowance	72.00
3. Transportation	53.16
4. Hand Bills and Bulletins	
5. Meetings Promotion Expense	
6. Postage	
7. Telephone—Telegraph	30.26
8. Miscellaneous	
TOTAL	155.42
DEDUCTIONS	
1. Social Security—State Unemp. Tax	
2. Advances	
3. War Bonds	
4. American-Allied War Relief	
5. Government Tax	
6. Group Insurance	
TOTAL DEDUCTIONS	

Q-4 (7)

ORIGINAL

EXPENSE ACCOUNT
International Union Mine, Mill and Smelter Workers

District No. Casting Division — Period Ending June 15th

DATE	TRANSPORTATION FROM	TO	AMOUNT	EXPENSE ALLOWANCE
1	Denver vic.		1.60	9.00
2	Denver	New York en route	3.20	9.00
3	New York vic		1.80	
4	New York	Garwood - RE	2.60	
5	New York vic		1.90	
6	"		2.10	
7	New York	Garwood - RE	2.60	
8	New York vic.		1.90	
9	New York	Garwood - RE	1.75	
10	New York vic.		1.60	
11	New York	Garwood - RE	1.85	
12	New York vic.		2.10	
13	New York vic.		2.00	
14	New York	Garwood - RE	2.60	
15	New York	Newark - RE	1.95	
	(DEDUCT FROM ADVANCE)	TOTAL	31.55	18.00

COURT EXHIBIT
PLAINTIFF'S
JUL 9 1948

In United States District Court
From Defendants' Exhibit Q-5
[fol. 1166]

NOTE—All accounts must be rendered semi-monthly to the Secretary-Treasurer. Pay periods are from the 1st to 15th, inclusive, and from 16th to 30th, or 31st, inclusive.

Expense accounts must be filled in each day.

Receipts for all expenditures listed must be sent in with expense account.

If receipts are not received, no payment will be made.

Only ordinary expenses will be reimbursed.

No receipts are necessary for transportation by auto (4c a mile).

Telephone and telegraph bills must be listed in detail on back of this sheet. If this is not done, the bills will not be paid. Phone calls from pay booths must be so listed.

Expense allowance will not be allowed unless employee is away from home station over night.

No staff member may incur expenses beyond those allowed by International Union.

Fill in columns at right.

Signature Irving Richter

Where Check Should be Sent 1000 Walnut Ave., Cleveland 14, Ohio

Approved by

(Over)

AMOUNT DUE	
1. Salary	
2. Expense Allowance	18.00
3. Transportation	31.55
4. Hand Bills and Bulletins	
5. Meetings Promotion Expense	
6. Postage	
7. Telephone—Telegraph	16.09
8. Miscellaneous	
TOTAL	65.64

DEDUCTIONS	
1. Social Security—State Unemp. Tax	
2. Advances	
3. War Bonds	
4. American-Allied War Relief	
5. Government Tax	
6. Group Insurance	
TOTAL DEDUCTIONS	

383

7621

Q-5 (3)

[fol. 1167]

[File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
January 8, 1965

Before Honorable Alfred P. Murrah, Chief Judge, Honorable John C. Pickett and Honorable Delmas C. Circuit Judges.

These causes came on to be heard and were argue counsel, Telford Taylor, Esquire, and Nathan Witt, quire, appearing for appellants, Donald P. MacDo Esquire, appearing for appellee.

Thereupon these causes were submitted to the cou

[fol. 1168]

IN THE UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

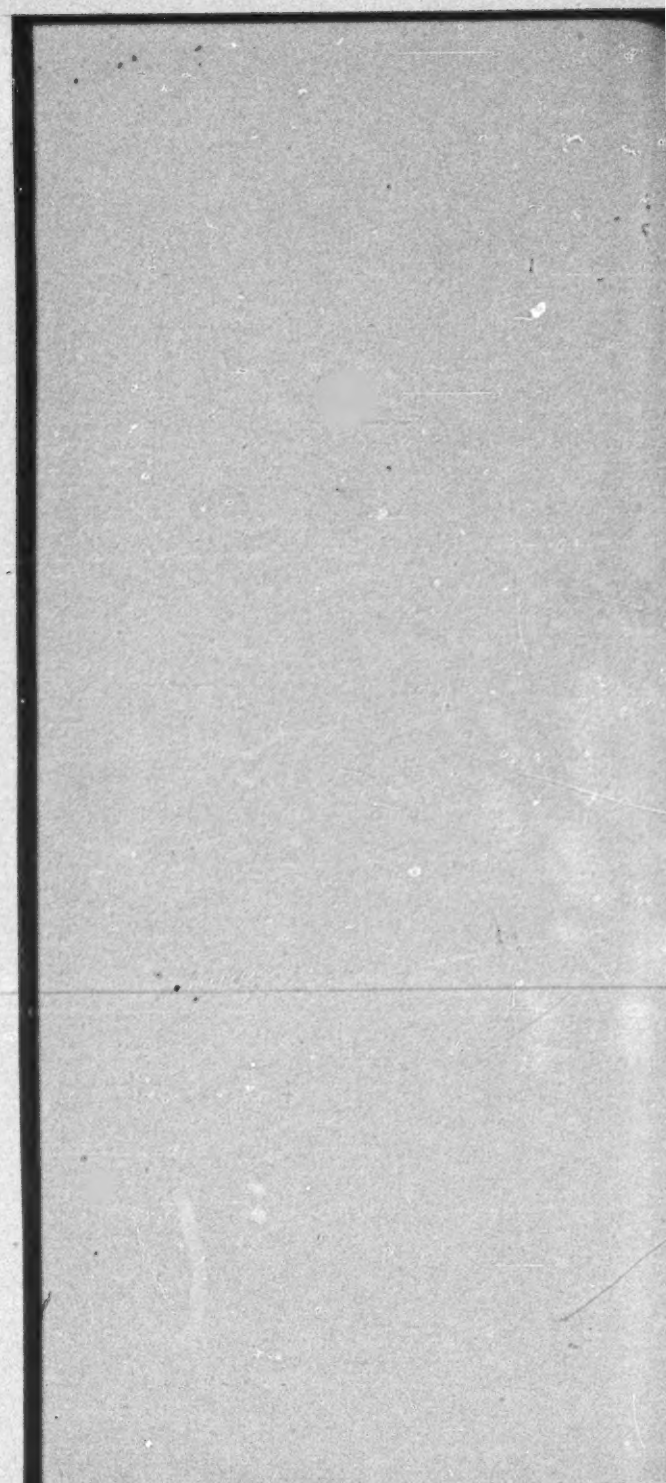
January Term 1965

No. 7621

RAYMOND DENNIS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.



No. 7622

IRVING DICHTER, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

No. 7623

HAROLD SANDERSON, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

No. 7624

ALBERT SKINNER, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

No. 7625

MAURICE E. TRAVIS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

[fol. 1169]

No. 7626

CHARLES H. WILSON, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

OPINION—April 26, 1965

Appeal From the United States District Court for the District of Colorado.

Telford Taylor and Nathan Witt (George J. Francis with them on brief) for Appellants.

Donald P. Macdonald (J. Walter Yeagley, Lawrence M. Henry and George B. Searls with him on brief) for Appellee.

Before Murrah, Chief Judge, and Pickett and Hill, Circuit Judges.

MURRAH, Chief Judge

[fol. 1170] Appellants appeal from a judgment of conviction on retrial after reversal of convictions on prior trial. See Dennis v. United States, 302 F.2d 5.

On the prior appeal we sustained the validity of the indictment and the Court's denial of all pre-trial motions. We reversed the case for admission of hearsay testimony, but sustained the sufficiency of admissible testimony to support the verdict of the jury as to all of the appellants except Durkin and Powers. As to them, we held the evidence insufficient to support conviction.

This appeal perpetuates the attack on the indictment, the constitutionality of 9(h) of the National Labor Relations Act, and the bar of the Statute of Limitations, but these points are not argued. The appellants do sharply challenge the sufficiency of the evidence on retrial to establish a conspiracy to violate §9(h), but argue if a conspiracy is established, it is at variance with the one charged in the

indictment. The contention is that the evidence on retrial is decisively different because some of the witnesses who testified in the former trial did not testify in this trial, and some who did gave materially different testimony. Several trial errors relating to the admission of evidence and instructions to the jury are reassigned in different trial context.

On the sufficiency of the evidence in this appeal to [fol. 1171] prove the alleged conspiracy the Government adheres to its original theory to the effect that before and after the enactment of §9(h) the Communist Party was opposed to its non-communist affidavit provisions; that the appellants were at once members of the Communist Party subject to its discipline and officers or functionaries in the "Mine Hill" Union; that the Communist Party dictated the Union's opposition and consequent refusal to comply with the provisions of §9(h); that in the Summer of 1949 the Communist Party changed its policy to comply with the provisions of the Act, and the Union, acting through the appellants as its officers, obediently changed its policy to one of compliance; and that pursuant to this changed policy, some of the appellants filed false non-communist affidavits with the knowledge and guilty intent of all.

It does not seem to be disputed that during all or part of the time laid in the indictment, all the appellants were members of the Communist Party and also officers or staff members of "Mine Mill";[1] that the Communist Party and [fol. 1172] the Union both opposed compliance with §9(h), and at first the Union refused to comply. That thereafter

[1] Before and after the commencement of the alleged conspiracy and until 1955, Travis was Secretary-Treasurer of the Union; Wilson was first International Representative, later Executive Board Member, and then Vice President of the Eastern territory. Sanderson was a member of the office staff and most of the time acted as Assistant to the President. VanCamp was Board Member of District 3 and was succeeded by Dennis. Dichter and Skinner were International Representatives. When in 1955 Pezzati succeeded Travis as Secretary-Treasurer, Dichter succeeded him as Board Member from District 6. Dennis was first an International Representative and later succeeded VanCamp as Board Member from District 3.

the Communist Party changed its policy to advocate compliance with the Act, and the Union, acting through the appellant-directors, complied with the Act by filing non-communist affidavits, some of which were false. But, the appellants earnestly contend that this parallelism of policy and identity of membership falls far short of proving a conspiracy among the appellants to defraud the Government by filing false non-communist affidavits to effectuate Union compliance with §9(h). We are reminded that the gist of the offense charged is the unlawful agreement which is not proved by the factum of filing false affidavits by one or more of the appellants. See United States v. Borelli, 336 F.2d 376, 384.

The Government pins its case of unlawful agreement on the prolonged association of the appellants as members of the Party and officers of the Union, dedicated to a common cause, i.e. compliance with §9(h), by the conscious filing of false non-communist affidavits.

In the former appeal we were of the view that quite apart from the excluded testimony, the statements made by appellants Travis and Wilson relative to a change in the Party policy; the record proof that appellants as Party Members subjected themselves to Party discipline; the evidence that a "Steering Committee", "of which some of the [fol. 1173] appellants were members" transmitted the "Communist Party program, decisions, to the Union * * *" for implementation; appellants' common knowledge of the problems presented by the Taft-Hartley Act; and the common bonds existing between appellants as members of the Communist Party and as officers and employees of "Mine Mill", authorized the jury's findings that the alleged conspiracy laid in the indictment was consummated, i.e. See Dennis v. United States, supra, p. 10.

We then proceeded to analyze the evidence to determine its sufficiency to justify the jury's findings of conscious participation on the part of the individual appellants. In doing so we observed the well known and salutary rule that "mere knowledge, approval, or acquiescence in the object or purpose of a conspiracy does not make one a conspirator". Id. p. 12. We thought that while the evidence was unquestionably sufficient to show that Durkin and Powers

were active members of the Communist Party, it was insufficient to connect them with the conspiracy. We reversed the case as to them with directions to grant the motion for acquittal.

After reviewing the record in some detail, we thought the evidence sufficiently connected Dichter, Sanderson and VanCamp with the conspiracy to justify the jury's verdict. VanCamp was acquitted on retrial.

Without tediously analyzing the proof relating directly [fol. 1174] to the appellants Dennis, Skinner, Travis and Wilson, we were of the view that their "individual acts and declarations were forcefully demonstrative of their culpable association in the conspiracy." (Former appeal, p. 10)

If the evidence was sufficient to convict on the former appeal, the same evidence is, of course sufficient now, and the only question of sufficiency then is whether, as appellants contend, it was materially different and decisively less convincing.

Witness Mason died before retrial, and his testimony (Former appeal, p. 9) concerning appellant Travis was perpetuated under the rule of Mattox v. United States, 156 U.S. 237; West v. Louisiana, 195 U.S. 258.

As to appellant Wilson, it is argued that testimony in this trial tending to connect him with the conspiracy is materially different from the former. Specifically, witness Fikes' testimony in the former trial concerning Wilson's incriminatory statements (made at a meeting in Bessemer, Alabama, in the Summer of 1949) to the effect that the letters of resignation from the Communist Party "wouldn't mean anything and would be phoney" was not repeated on retrial. Instead, Fikes and Lawrence (a member of the Communist Party who attended the Bessemer meeting but did not testify in the first trial) testified concerning the meeting that Wilson was opposed to policy change, and they gave no testimony concerning any statement by him [fol. 1175] that the resignations from the Party would not be genuine. Witness Lawrence is represented as quoting Wilson to the effect that "none of the Executive Officers could have any connection with the Party, that is, they could not attend meetings, meet with the Party officials or

make contributions directly to the Party." The testimony of these witnesses was literally different, but the import of the language used was the same. It was susceptible to the inference that Wilson knew of and consented to the change in Party policy and actively participated in the effectuation of it as a Union officer.[3]

[fol. 1176] At the time of the Bessemer meeting in the Summer of 1949, Travis and Wilson were officers of the

---

[3] At the Bessemer meeting in the Summer of 1949, attended by Hudson (a Communist Party functionary), Lawrence, Fikes, Wilson, Hall (a local Party official) and others, Fikes testified that Hudson (who was not a member of the Union) stated, "decision had been made by the Party that officials of the union (Mine Mill) were to comply with the Taft-Hartley law. * * * So, he (Wilson) said that they would sign a letter of resignation to the Party, and that they would see that this got into New York—the letter of resignation from the party. But they would continue—that this would be on paper only, a piece of paper—and that they would continue to read the Party press, give donations and it was of utmost—it should be utmost in everybody's mind that the security was the most important thing at this time, because they had to sign this letter of resignation from the Party and was supposed to be out where they could sign the affidavit. * * * he said that he had been to a Board meeting and also met with Party people, and that he was opposed to signing the affidavit on principle, but something had to be done. They had to do something to save the Union. And so therefore he went along with this, that they should resign, write a letter of resignation and should sign the affidavit. * * * Also he spoke of a liason" between the Party and the Union.

Lawrence testified that at the same meeting "Mr. Wilson reported that the Executive Board had taken action to comply with that provision of the Taft-Hartley Law involving the signing of non-Communist affidavits. He said that all of the Executive Officers—that is, those who, under the law, were to sign the affidavits—had to resign from the Communist Party, that in all except one case this took the form of signing letters which were deposited with local functionaries in each area, in which they resigned from the Communist Party and that in the person of the Secretary-Treasurer (Travis) it was a matter of public resignation.

"He went on to say that from this point on none of the Executive Officers, or none of the Taft Hartley-ites, as I believe the term can be used, could have any connection with the Communist Party, could not attend meetings, could not—Let me go over that again—that they could not attend meetings, they could not meet with Party officials, and could not make contributions directly to the Communist Party.

Union. Travis was Secretary-Treasurer and Wilson was a member of the Board. In accordance with the understanding at the meeting, Travis soon thereafter publicly announced his resignation from the Party in adherence to clearly articulated Party-Union policy. (See Mason's testimony, Former appeal, p. 9)

Appellants suggest that the Government's case against each of the appellants is made up of uncorroborated statements of witnesses concerning incriminating statements by the appellants or by others in their presence, and these [fol. 1177] statements or admissions are wholly inadequate as a matter of law to prove the offense charged.

Uncorroborated statements or admissions are insufficient to prove guilt. See Opper v. United States, 348 U.S. 84; Yarbrough v. United States, 309 F.2d 936; Wong Sun v. United States, 371 U.S. 471; Annotation 45 A.L.R. 2d 1317; Krulewitch v. United States, 336 U.S. 440. But, incriminating statements made by one co-conspirator during the pendency and in furtherance of a conspiracy are admissible as an exception to the hearsay rule once a conspiracy has been shown.[3] See Wong Sun v. United States, supra,

---

"But insofar as Staff members were concerned, there would probably be coordination of their Party activities from that point on primarily within the Union rather than in terms of a series of connections with local Party organizations, but that the details had not yet been worked out.

"But he had indicated that there would be some change in terms of less connection and also in terms of money going into a different area than the local party organizations. This is my best recollection of his report."

[3] Mr. Justice Black, speaking for the Court in Krulewitch v. United States, supra, states: "There are many logical and practical reasons that could be advanced against a special evidentiary rule that permits out-of-court statements of one conspirator to be used against another. But however cogent these reasons, it is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements are admissible as exceptions to the hearsay rule. This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts."

citing Developments in the Law—Criminal Conspiracy, 72 Harv. L.R. 922, 989, 990; Fiswick v. United States, 329 U.S. 211; Krulewitch v. United States, supra; Gay v. United States, 322 F.2d 208; and Cleaver v. United States, 238 F.2d 766; Briggs v. United States, 176 F.2d 317.[4] This [fol. 1178] practice has often been criticized (See Justice Jackson specially concurring in Krulewitch, supra, p. 445), but has never been rejected. See Developments in the Law —Criminal Conspiracy, supra.

True, the Government's case here primarily consists of the testimony of eight witnesses who gave evidence of numerous meetings and conferences at different times and places during the period of the alleged conspiracy at which one or more of the appellants participated. This testimony was admitted in evidence under conventional cautionary instructions to the effect that the statements were not binding on any of the appellants not present when made. These instructions were given repeatedly upon suggestion of defense counsel. At the conclusion of the Government's case, the jury was instructed, "If it now appears from the evidence to your satisfaction beyond a reasonable doubt that a conspiracy existed and that a defendant was one of the members, then the acts knowingly done and the statements knowingly made after the formation of such conspiracy by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy."

Compliance with the rule against the admission of hear- [fol. 1179] say until a conspiracy has been shown by some independent evidence has been observed by according the trial judge wide latitude in the procedural order of proof.

---

[4] Some were admitted to show Party-Union policy prior to the alleged formation of the conspiracy, and they were, we think, competent to lay the foundation for the agreement.

See Briggs v. United States, supra. The only protection accorded the absent defendant to be charged with the testimony is the conventional cautionary instruction which the trial court freely used in this case. This practice has also been criticized as "unmitigated fiction", See Justice Jackson specially concurring in Krulewitch v. United States, supra, but it has been traditionally accepted as the only available method of proof for getting at surreptitiously conceived unlawful agreements.[8]

Appellants say that the trial court erroneously departed from his limiting instructions in the general instructions to the jury, but we do not think so. The jury was told they must first determine the existence of the conspiracy charged, and if they entertained a reasonable doubt of the conspiracy as charged, their task was at an end, and they should acquit all defendants. But, if on the other hand, they were convinced beyond a reasonable doubt of the existence of a conspiracy, they should then proceed to consider which, if any, of the appellants were members of it. And, they should determine the participation of any [fol. 1180] defendant in the conspiracy from the evidence relating to his own acts, declarations and conduct with the actions and conduct of others; that guilt was personal and individual, but once a conspiracy was formed each member became the agent of the other in all things done or said in the promotion or furtherance of the unlawful purpose; however, declarations made not in furtherance of it were not binding on any other members.

The jury was told that mere membership in the Communist Party or affiliation with it or the filing of non-communist affidavits with the National Labor Relations Board was not in itself sufficient to show that any particular defendant was in fact a member of the conspiracy. These instructions clearly and succinctly stated the law of the case and were entirely consistent with the trial court's cautionary instructions.

---

[8] See Goldstein, Conspiracy to Defraud the United States, 68 Yale L.J. 405 (1959).

In the former appeal we approved the procedure by which hearsay statements of alleged co-conspirators may be received as evidence after some evidence aliunde from which the jury could find the existence of a conspiracy and the speaker's complicity in it. See Former appeal, p. 10 and Briggs v. United States, supra. Indulging in this concept of trial procedure and order of proof, we were of the view that the evidence taken together was factually sufficient to support the alleged conspiracy. The evidence in this appeal is not materially different.

[fol. 1181] Appellants complain of the exclusion of business records to prove alibi and discredit prosecution testimony. Specifically, they complain of the refusal of the trial court to admit the expense vouchers of Dichter to show that he was not in Cleveland all the time to which witness Locke testified. (Former appeal, p. 11).

Locke's expense vouchers were admitted to impeach his testimony to the effect that Travis fired Eckert on April 8, and Dichter took over the office management in Cleveland. Locke's vouchers showed that Eckert continued to approve his expense vouchers until about the middle of May. Later the defense offered Dichter's expense vouchers for the months of April and May, apparently not as a part of cross-examination of Locke, but to impeach his testimony that Dichter took over management of the office for the next "month or two" and that he "had meetings nearly every morning for a while". When the exhibits were offered, Government counsel stated that he understood the purpose of the vouchers was to show "where [Dichter] wasn't at a particular time." Counsel agreed. On this premise the Government objected. The matter was then passed until recess when the offer was renewed "to controvert the testimony of the prosecution witness, Ralph Locke * * * about what was going on in Cleveland beginning around April 8 or 9, 1948."

The Court sustained the objection to the offer of proof [fol. 1182] without stating any grounds. No point was made of the authenticity of the vouchers or that they were

not a part of the business records of the Union within the meaning of 28 U.S.C. 1732. And, the vouchers may well have been admitted into evidence to impeach Locke's testimony concerning specific dates, but the dates on which Dichter was in Cleveland was not a point on which Locke's testimony was crucial. Failure to admit the vouchers is not fatal to the Government's case.

Appellants also complain of the refusal of the Court to life the lid of secrecy on the grand jury proceedings. The Court's refusal was based upon lack of showing a "particularized need". In the former appeal we sustained the trial court's ruling in view of "the availability of the transcripts of testimony relating to the same subject matter given by many of the Government witnesses before other tribunals and the voluminous statements of such witnesses produced under 18 U.S.C.A. §3500". (Former appeal, p. 14).

It is suggested that the availability of other material should not be grounds for denying access to the grand jury proceedings, and we agree. Indeed, it may very well disclose inconsistencies indicating the particularized need. Certainly the trial court ought not decline an "in camera" suggestion in face of the appearance of inconsistencies which might lead to disclosure of further inconsistencies [fol. 1183] in grand jury proceedings.

Some courts have required judicial inspection of grand jury testimony upon the request of a party against whom a witness has given incriminating testimony. See U.S. v. Hernandez, 290 F.2d 86; U.S. v. Giampa, 290 F.2d 83. Other courts have required "in camera" inspection whenever it appears "that the testimony of an important prosecution witness at trial may be inconsistent with his testimony before the grand jury." Simmons v. United States, 308 F.2d 324; Harrell v. United States, 317 F.2d 580. We have been more reluctant to require "in camera" inspection in the absence of some indication of inconsistency. Travis v. United States, 269 F.2d 928, 944; Bary v. United States, 292 F.2d 53, 56. See Also Berry v. United

States, 295 F.2d 192; Herzog v. United States, 226 F.2d 561.* But, we have left no doubt of the inherent power [fol. 1184] and the inescapable duty of the trial court to lift the lid of secrecy on grand jury proceedings in aid of the search for truth. The court should not hesitate to inspect and to disclose any inconsistencies if it is likely to aid the fair administration of criminal justice through proper cross-examination and impeachment. In determining variances or inconsistencies we should remember that flat contradictions are not the only test of inconsistency. Omissions of fact or even contrast in emphasis or different order of treatment may be relevant to the process of testing credibility of a witness' trial testimony. See Clancy v. United States, 365 U. S. 312, 316, quoting Jencks v. United States, 353 U. S. 657, 667.

Our affirmance is based primarily on the proposition that inasmuch as the witnesses were thoroughly and competently cross-examined on numerous other relevant judicial and extra-judicial statements without manifest inconsistency, it is safe to assume that the grand jury proceedings would not have disclosed anything of impeaching significance. While it would have been safer to have inspected the grand jury testimony, in these peculiar circumstances we remain unwilling to say the trial court committed [fol. 1185] reversible error by refusing the "in camera" inspection.

Complaint is also made of the Court's interpretation and application of 18 U.S.C. §3500. This evidentiary stat-

---

* The federal courts have been roundly criticized for their "paltry interpretation" of the statutory law and federal rules of discovery. Chief Justice Roger Traynor has recently accused federal judges of continuing "to bar discovery upon the rationalization, at odds with the apparent intention of the draftsmen of the rules, that failure to authorize discovery is an implied prohibition of it. * * * the federal courts fail to exercise their inherent power to foster a wholesome integration of discovery procedures into the judicial process." "Ground Lost and Found in Criminal Discovery", Vol. 39, N.Y.L.R., April 1964, pp. 228, 238, 240. See Jones v. Superior Court of Nevada County, 372 P.2d 919. See also 111 U. Pa. L.R. 1154, 1181-95.

ute has been authoritatively interpreted to require full disclosure by the Government to the Court of all questionable documents relating to the subject matter of a witness' testimony. But, "Final decision as to production must rest as it does so very often in procedural and evidentiary matters within the good sense and experience of the District Judge * * * subject to limited review of the appellate courts." See Palermo v. United States, 360 U.S. 343, 353; Campbell v. United States, 365 U.S. 85, 373 U.S. 487; Clancy v. United States, 365 U.S. 312; Bary v. United States, 292 F.2d 53; Ogden v. United States, 303 F.2d 724; United States v. Crosby, 294 F.2d 928. In determining the issue of producibility the trial court may, and sometimes must, resort to extrinsic evidence bearing not only on the nature of the document but the peculiar circumstances in which it was made. The need for and the extent of extrinsic evidence bearing on producibility must be left to the wise discretion of the trial judge. "This is a problem of the sound and fair administration of a criminal prosecution and its solution must be guided by the need, reflected in so much of our law of evidence, to avoid needless trial of [fol. 1186] collateral and confusing issues while assuring the utmost fairness to a criminal defendant." See Palermo v. United States, supra, 355; Saunders v. United States, 316 F.2d 346. The appellate function on review is to examine the perpetuated withheld document and voir dire inquiry, if any, to determine whether full consideration has been given to the issue and finally whether the trial court's determination is clearly erroneous. See Campbell II, supra, 493.

Specifically, appellants say that Mason's testimony was rendered inadmissible because of the lack of voir dire in the first trial. The complaint rests on these facts. Several of Mason's statements were delivered to the defense under §3500 for use in the first trial. In response to a question from defense counsel the Government prosecutor stated in effect there were no other "statements", and defense counsel accepted Government counsel's word. At the second

trial, additional material in the form of interview notes, reports and memoranda were submitted to the Court.

The appellants insist that they were misled by the "ambiguous representations" of Government counsel, and relying thereon did not voir dire Mason to the prejudice of their right to full cross-examination; that Mason's record testimony should, therefore, be excluded in the second [fol. 1187] trial. For whatever reason, there was no voir dire of Mason although he was thoroughly and competently cross-examined based upon numerous statements produced pursuant to interviews with Government agents or counsel.

If none of the additional documents submitted at the second trial can be said to be producible §3500 "statements" for purposes of cross-examination of witness Mason, no prejudice can result from Government's failure to submit them to the Court or lack of Mason voir dire with respect to them. Prejudice, if any, must inhere in the nature of the documents withheld not in the fact of withholding. All investigators or attorneys, except one, who interviewed Mason were called by the Government to testify concerning the nature of the particular interview and resulting interview report or memoranda. Cross-examination of these interviewers failed to indicate that voir dire of Mason on the first trial on the subject matter of the interviews or the nature of the resulting reports would have induced production of any of the submitted documents.

The trial court made specific findings with respect to each of the Mason interviews. In each instance it found that the report, trial memorandum or outline, as the case may be, was made from the memory of the interviewer, from notes made at the time of the interview but destroyed in good faith after dictation of the report or memorandum, [fol. 1188] or that the trial outline or memorandum had been composed from several sources of information including records of other trials involving some of the same witnesses and defendants. The Court specifically found that none of the documents in question was ever submitted

to Mason for signature or approval. With particular reference to the Crandall "outline" the Court found that it had been prepared from a transcript of Mason's testimony at the first Travis trial in which present defense counsel had participated. Addressing defense counsel during argument on the matter the Court stated, "So this outline was prepared in testimony that was elicited in open court in your presence in which you participated and it was in no sense a statement under 18-3500." The trial court's careful findings with respect to the documents resulting from Mason interviews are not clearly erroneous, and its ruling thereon must be sustained.

The only Mason interviewer (Foley) not produced for voir dire interviewed him in 1954 apparently regarding a National Labor Relations Board matter. This interview resulted in an affidavit by Mason which was made available to defense counsel in the former trial and redelivered in the present trial. From interrogation of Government counsel the Court was satisfied the affidavit was the only document relating to the interview of Mason by Foley. In [fol. 1189] these circumstances the trial court's refusal to recall the interviewing attorney from Washington for voir dire was not error. We conclude that Mason's testimony was not improperly perpetuated.

All of the other documents relating to the subject matter of the testimony of all other witnesses delivered to the Court for determination of producibility under §3500 were carefully considered by the Court pursuant to the extensive voir dire examination of both the witnesses and with two exceptions (to be noted) the interviewing Government agents. With respect to each identified document or group of documents the responsible interviewing agent testified that he prepared the report, memorandum or outline either from memory or from fragmentary notes, including "key words and phrases", or that the memorandum or outline was composed from information obtained from the testimony of witnesses in other similar trials and in no instance were any of the documents submitted to or in any way

adopted by the related witness. Some of the interviewers who took notes of the interview testified that the notes were destroyed in good faith after dictation of a memorandum. Each witness also testified that although in some instances the interviewer took notes, they were never submitted for signature or approval nor was he in any way called upon to adopt the notes or any other document made pursuant to the interview.

[fol. 1190] One interviewer testified by affidavit (admitted into the record without objection) that he prepared a memorandum of his interview with witness Gardner from fragmentary and abbreviated notes of the matters discussed, but they in no sense purported to be verbatim remarks of Gardner nor were they ever read to him nor was he called upon to approve or affirm them. The notes were appended to the affidavit for the record.

Appellants complain of the failure of the trial court to require the attendance of one interviewing attorney for purposes of voir dire. This Government attorney for the Immigration and Naturalization Service interviewed witness Fikes apparently concerning some matter relating to a deportation hearing. When defense counsel suggested the Court require the interviewing attorney be produced for voir dire, the Court inquired of witness Fikes whether he had made any written statement of any kind to this interviewer. Fikes answered he had not and moreover no questions were asked concerning any of the appellants in this case. There was no further cross-examination of any kind and the trial court rightly declined to produce the witness.

Based upon voir dire testimony of all responsible interviewers and related witnesses and an examination of each document or group of documents, the trial court concluded [fol. 1191] that none of the withheld documents was a statement within the definition of §3500. His conclusions were based upon specific findings to the effect that none of them was ever signed or otherwise adopted or approved by the witness nor was it a "verbatim recording" of the

interview of the witness. Appellants do not now contend that any of the documents were signed or otherwise adopted or approved by the witness within the definition of §3500(e)(1). The contention is to the effect that the trial court simply stopped there and did not proceed to determine whether the documents or any of them were producible under §3500(e)(2) as "other recording * * * which is substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement".

We do not think that failure of the trial court to couch its findings in the verbatim language of the statute is any indication of its failure to consider the producibility of the documents as "verbatim recitals" of the oral statements of the witnesses. Appellants were undoubtedly contending for production under either subsection of §3500, and the trial court's inspection and ruling on each document was undoubtedly based upon producibility under either subsection of the statute. In any event we have examined all of the excluded material certified here under seal for the [fol. 1192] purpose of determining producibility of any of the documents as contemporaneous "verbatim recitals" of oral statements of witnesses.

Our independent examination shows that the trial court did produce a number of statements without excision. Much excised material was produced. The documents and excisions which were withheld related in the main to members of the Communist Party, many of whom are unrelated and unidentified with this case. Others related to activities of the appellants wholly unrelated to these charges. The withheld documents were couched in the vernacular of "Informant stated", "Informant advised" or "Informant related", but none we have examined can be said to be a verbatim recital within the meaning of §3500(e)(2). We think they were properly withheld.

During the course of the trial, the defense moved to strike the testimony of witnesses Lawrence, Fikes, Locke and Gardner in consequence of the destruction of the inter-

view notes after preparation of memoranda based thereon. These motions were inspired by footnote 5 of Campbell II, supra, p. 491, where the Court posed but did not answer the issue whether "If the notes were producible under the Act, their destruction gives rise to sanctions under subsection (d) or permits secondary evidence of their contents to be produced". We have no occasion to decide this issue [fol. 1193] since the question itself presupposes producibility of that which was destroyed. Certainly we should not order the production of an otherwise non-producible document on the chance its non-existent progenitor might have been producible.[7] While the notes are not available for inspection to determine producibility, examination of the memoranda which are based on the notes affords no basis for surmising that the antecedent notes were verbatim recitals of oral statements of the witnesses. On the contrary they indicate quite clearly to us that the notes were not producible so as to give rise to the question of sanctions under subsection (d). In these circumstances we think the trial court properly denied the motions to strike.

Finally, appellants complain of the refusal of the trial court to give their requested cautionary instruction on "accomplice testimony". The request is based upon the assumption that the witnesses Fikes, Lawrence, and Gardner, although not co-defendants or co-conspirators, were within the definition of an "accomplice" because they were in "some way concerned or associated in the commission of the crime". See McLendon v. United States, 19 F.2d 465, 466; Johns v. United States, 227 F.2d 374; Cleaver v. [fol. 1194] United States, 238 F.2d 766.

It may be conceded arguendo that these witnesses came within the category of an accomplice by virtue of their membership in or affiliation with the Communist Party and their association with the appellants. Even so, we think

---

[7] It is admitted that the notes were destroyed in good faith in accordance with established practice of the FBI.

the trial court's careful instruction on the weight to be given the testimony of former members of the Communist Party and "so-called informers" was entirely sufficient to caution the jury concerning the treatment to be accorded the testimony of these particular witnesses.[6]

Judgment is affirmed.

---

[6] The Court instructed the jury, "In weighing the testimony given by former members of the Communist Party, you should consider whether the circumstances of their membership or their leaving the Party might have given rise to some hostility or prejudice against the Communist Party or against these defendants which might affect the accuracy or truthfulness of their testimony.

"The evidence shows that certain of the Government's witnesses were in times past engaged by the Government as confidential informants to join the Communist Party and make reports to the Federal Bureau of Investigation of such facts as they learned during such association, and they were paid considerable sums of money for their long service while so engaged for procuring evidence, including among other things with respect to the activities of the defendants. In weighing the testimony of such witnesses you should scrutinize their testimony with greater care and caution than if they were not so engaged. In this connection, it should be borne in mind it is sometimes necessary in proving the commission of certain crimes for the Government to rely upon evidence furnished by these so-called informers. All of the factors which might act as an inducement to a witness to deviate from the truth or to color testimony should be considered by you. However, you should not infer that the existence of any of these factors or any one of them in relation to some of the witnesses is of itself sufficient to [fol. 1195] discredit such witness' testimony. A witness who is a former member of the Communist Party or an informer or who by reason of interest, hostility, bias or hope of reward might be induced to give false testimony may nevertheless testify accurately and truthfully. If you find that such witness has testified truthfully, then such testimony is as good as the truth testified from any other source. What the fact is in this regard as to all the witnesses for both the Government and the defendants is for you to determine in the light of all the circumstances and in accordance with your experience and best judgment."

[fol. 1196]

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JUDGMENT IN DENNIS v. U.S. AND NOTE RE OTHER JUDGMENTS—April 26, 1965

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett and Honorable Delmas C. Hill, Circuit Judges.

(Case No. 7621)

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Raymond Dennis, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

(The above judgment was entered in cases Nos. 7622, 7623, 7624, 7625 and 7626.)

[fol. 1197] [File endorsement omitted]

[fol. 1198]

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Nos. 7621 to 7626, inclusive

RAYMOND DENNIS, et al., Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

PETITION FOR REHEARING—Filed May 6, 1965

The appellants herein respectfully submit the within petition for rehearing to this Court. The first portion of the petition is addressed to questions involving all of the appellants. The latter part of the petition is addressed to questions involving three of the appellants.

I. Declarations Not Made in Furtherance of the Conspiracy.

The appellants in their opening brief (pp. 28-29) and in their reply brief (pp. 6-7) took issue with the trial court's instruction which related to admissibility of certain vicarious admissions not made in furtherance of the conspiracy. The government maintained in its brief (G. br. 59) that the determination of whether a declaration was or was not made in furtherance constituted a question for the jury. The appellants argued that the determination of whether a given declaration was or was not made in furtherance of the conspiracy charged is not a question for the jury to determine but a question of law for the court. The trial court should have instructed the jury that certain declarations were not made in furtherance of the conspiracy and that such declarations could only be considered against

the declarant. The rule is clearly stated in *United States* v. *Guido*, 161 F.2d 492, 494-95 (C.C.A. 3) where it was held reversible error for the trial court to fail so to instruct the jury. See also *Fiswick* v. *United States*, 329 U.S. 211 at p. 217.

[fol. 1199] The opinion of this Court omits reference to this question and thus overlooks a substantial question of law. The appellants urge this Court to reconsider its opinion in light of this rule.

II. Exclusion of the Dichter Vouchers.

The opinion of the Court (pp. 13, 14) holds that the exclusion of the Dichter vouchers was not fatal to the government's case because "... the dates on which Dichter was in Cleveland was not a point on which Locke's testimony was crucial." The importance of Locke's testimony was that, according to his testimony, Dichter took over in Cleveland April 8 and immediately thereafter for a two month period held regular meetings with a Communist Party functionary Joe Brandt. (R. 80 et seq.) Locke also testified that in this same period he, Dichter, and Dennis belonged to a Communist Party Club and that Dichter attended some of these meetings as did Dennis. (R. 85, 86)

If Dichter had moved to Cleveland April 8, attended Communist Party meetings, and conducted almost daily meetings of Mine-Mill personnel together with Joe Brandt, as Locke testified, then such activity was crucial to the government's case if true, and equally crucial to the appellants' case if false. But, if Dichter was not in Cleveland the greater part of this two month period as his vouchers would have shown, then his vouchers should have been admitted to refute Locke's testimony. If Dichter was not in Cleveland the greater part of the two month period described by Locke, then he could not have participated in daily meetings with the Communist Party functionary Joe Brandt. Furthermore, the truth of Locke's assertion that Dichter attended meetings with Dennis of the Communist Party Alcoa Club would have been shaken.

The proposed introduction of the Dichter vouchers was not to establish the dates on which Dichter was in Cleveland as the opinion of this Court suggests. The proposed introduction of Dichter's vouchers would have attacked the basic credibility of Locke's testimony.

[fol. 1200] The opinion of the Court (p. 14) infers that the vouchers were not admitted because not relevant and that this was the basis of the trial court's ruling excluding them. However, the record shows that the trial court excluded the Dichter vouchers on grounds that they were excludable as not being business records (R. 1109) and on the same grounds as in the first trial (Tr. 2728) that they could not be used to show where Dichter was not at a particular time.

The opinion of this Court on the Dichter vouchers, therefore, that it was of no importance on what dates Dichter was in Cleveland overlooks the vital importance and purpose of the Dichter vouchers.

III. Mason's Inadmissible Testimony.

The Court's disposition (pp. 18-19) of the prosecution's failure, on the first trial, to produce material (notes, report and memoranda) derived from interviews by government attorneys with Mason begs the question. The Court says (p. 19) that none of this material, when produced at the second trial, was shown to be producible under Section 3500. Therefore, says the Court, the defense was not prejudiced by the failure to produce on the first trial when Mason was available for *voir dire*.

The Court's conclusion that no harm was done, however, overlooks the fact that if the material had been made available to the court on the first trial, *voir dire* of Mason may have shown that all or some of it constituted "statements".

Without the documents, no *voir dire* at all, either of Mason or of the government attorneys, could take place on the first trial. Without Mason, the *voir dire* on the second

trial was fatally incomplete. And there is no question that the fault is the prosecution's. As this Court says (p. 18), the government represented on the first trial that there were no other "statements". But, as the prosecution recognized on the second trial—with the law settled by the *Campbell* cases and the *Bary* case (appellants' opening brief, p. 45)—it is for the trial court to decide whether a document is a "statement". On the first trial, it was the prosecution which made this determination, not the court. [fol. 1201] Even if the prosecution's representation on the first trial was made in good faith, a question of due process arises. *Brady* v. *Maryland*, 373 U.S. 83, 87; *United States* v. *Consolidated Laundries*, 291 F.2d 563, 570 (C.A. 2); *Barbee* v. *Warden*, 331 F.2d 842 (C.A. 4). In any case, this Court's conclusion that the producibility of a document as a "statement" can be determined without examination of the witness flies in the face of the *Campbell* cases.

IV. The Failure to Produce Foley.

The opinion of the Court (pp. 20-21) is mistaken about the circumstances surrounding Mason's affidavit in the National Labor Relations Board matter.

Foley, the NLRB attorney, interviewed Mason in Washington in 1954, as the Court says (p. 20). The trial judge declined to require Foley's appearance as a witness on *voir dire* under Section 3500 for no reason except that Foley was in Washington (appellants' opening brief, p. 47). Subsequently, the trial judge added that an affidavit by Mason which eventuated from the Foley interview had been delivered to the defense (appellants' opening brief, p. 48, n.).

In its opinion, this Court accepts the trial court's understanding as to how Mason's affidavit came about. Foley's interview with Mason in Washington, says the Court, "resulted in an affidavit by Mason" which was turned over to the defense (p. 20). On this ground alone, the Court concludes that the trial court's refusal to call Foley was not erroneous (pp. 20-21).

It is simply not the case that the affidavit which the defense got "resulted" from the Foley-Mason interview. We pointed out to this Court in our opening brief (p. 48, n.) that the affidavit "shows on its face that it was made and acknowledged in Butte in March, 1954, and which Mason had mailed to Foley before the latter interviewed him in Washington in May (R. 208-14)."

Since the factual basis for the Court's conclusion that it was not error to fail to call Foley is plainly wrong, the Court should reconsider the matter.

[fol. 1202] We add one further consideration. Since Mason's NLRB appearance was the first of his several appearances as a witness, any statement Foley may have taken from him would have peculiar significance. Mason's crucial testimony on the first trial on the present indictment, in 1959, related to several conversations in 1949. What he said in 1954 about events in 1949, all other things being equal, was more likely to be complete and accurate than what he said about those same events in 1959.[1] In any event, the defense was entitled to know, especially in the case of so important a witness whose death foreclosed another opportunity for cross-examination.

V. The Instruction on Accomplice Testimony.

The Court's conclusion (pp. 25-26) that the failure to give the instruction on "accomplice testimony" was not prejudicial is mistaken in fact and wrong in logic.

The Court says (p. 25) that we assumed that Lawrence (like Fikes and Gardner) was an "accomplice" even though he was not a co-defendant or co-conspirator. Certainly as to Lawrence, we did not so assume. He *was* a defendant, one of the three who pleaded *nolo contendere* before the first trial (appellants' opening brief, p. 2).

Aside from that, the Court concludes (p. 26) that even if these three witnesses—Lawrence, Fikes, and Gardner—

[1] That a producible statement was probably available is indicated by Mason's testimony on the *Travis* retrial about the Foley interview that "I think he took some notes" (appellants' opening brief, p. 48, n.).

were accomplices, the trial court's instruction on the weight to be given the testimony of ex-Communist Party members and informers was sufficient to caution the jury.

Only one of the three witnesses, Fikes, was an informer, so the informer instruction was irrelevant as far as Lawrence and Gardner were concerned. In any case, it is hard to see how it is that if testimony is inherently and legally [fol. 1203] weak for three reasons, the law is satisfied if the trial judge cautions the jury on two, especially if the one which is ignored (over protest) is the one which, as the fifth circuit has said, is "frequently—of crucial importance". *Williamson* v. *United States*, 332 F.2d 123, 132. This is an area where multiple impact may be crucial with a jury, so that the failure to give the "accomplice" instruction in addition to the other two may well have tipped the scale against the defendants. Be that as it may, it is a novel proposition that even though the law requires the instruction to be given, it need not be if the testimony is suspect for other reasons.

VI. Insufficiency of the Evidence as to Dichter, Sanderson, and Skinner.

With all due respect, we believe that the Court was in error in its omission to consider the sufficiency of the evidence against each appellant. On the first appeal this Court did review the sufficiency of the evidence with respect to each appellant in order to determine whether each conviction should be upheld.

As the Court says (p. 6), we contended that on the retrial the evidence against the appellants was materially different than on the first trial so that, even if sufficient originally, it was insufficient the second time. But instead of examining the differences in the cases of all of the appellants, the Court reviews the differences only in the case of appellant Wilson (pp. 6-8).

In the cases particularly of Dichter, Sanderson, and Skinner, we argued that the differences were of decisive significance (appellants' opening brief, pp. 37-41). Since

the Court has not dealt with these arguments at all, we take the liberty of summarizing them here for reconsideration.

Dichter—The only evidence against Dichter (appellants' opening brief, p. 37) is that he was a Party member in 1948—a year before the inception of the alleged conspiracy—and that in 1955, he had a conversation with Gardner in which he said he was conducting an investigation for the Party of Gardner's conduct in the union. Dichter had nothing to do with the original decision in 1949 to file the affidavits and filed none himself until 1955, when he first became a member of the Executive Board (G. Ex. 13). [fol. 1204] Since Dichter's conversation with Gardner in 1955 related in no way to affidavits or compliance, it tends to show at most that Dichter was a Party Member in 1955. In these circumstances, the evidence against Dichter falls clearly within the "isolated transaction" rule (appellants' opening brief, pp. 37-38).

Sanderson—On the first appeal, this Court pointed to Sanderson's membership on the "Steering Committee" as strong evidence of his guilty knowledge. 302 F.2d at 12-13. There is no evidence of any "Steering Committee" in this record. Also not in this record is the evidence in the earlier one that Sanderson attended three Party meetings in 1948.

What remains as to Sanderson are two pieces of undoubted hearsay, one in 1948 and one in 1949; a conversation with Gardner in 1953; and his presence at a Party meeting, according to Gardner, in 1955. As we pointed out in our opening brief (pp. 39-40), Gardner's testimony this time was different and less incriminating as to both episodes than it was originally, with the result that it tends to show only Party membership and that but slightly.

On the first appeal, the opinion of this Court mistakenly stated that Travis was present at the 1955 meeting with Durkin and Sanderson, 302 F.2d at p. 13. Actually, Gardner did not testify that Travis was present nor did he testify that Sanderson participated in any discussion at

that meeting (R. 1542-44). Finally, Lawrence's testimony that Wilson named Sanderson as coordinator of the Mine-Mill staff members allegedly in the Communist Party was inadmissible against Sanderson as he was not present at the time of the alleged conversation.

Skinner—Like Sanderson, Skinner was not an affiant. As to him also, the evidence of a "Steering Committee" is not in this record. Also lacking this time was the testimony of Ortiz from which, on the earlier record, guilty knowledge might have been imputed to Skinner. Nothing remains as to Skinner except testimony that he was a Party member during part of the indictment period (appellants' opening brief, pp. 40-41).

[fol. 1205] Thus, the evidence was patently insufficient in the cases of Dichter, Sanderson, and Skinner. The evidence is at most evidence only of Party membership, but even if the evidence against Sanderson and Skinner is evidence also of knowledge, that is still insufficient, as this Court pointed out in acquitting Durkin. 302 F.2d at 12. We respectfully suggest, therefore, that the Court's affirmance of the convictions of Dichter, Sanderson, and Skinner cannot be squared with the Court's acquittal of Durkin and Powers.

VII. Conclusion.

The appellants respectfully request the Court to grant the petition for rehearing on the grounds stated above.

Respectfully submitted,

George J. Francis, 817 Farmers Union Bldg., Denver 3, Colorado; Telford Taylor, 200 Park Avenue, New York 17, N.Y.; Nathan Witt, P. O. Box 156, New York 23, N.Y.; Attorneys for Appellants.

Certificate

Appellants, by their attorneys, hereby certify that the foregoing petition for rehearing is not presented for the purpose of vexation and delay, but is, in the opinion of counsel, well founded law and proper to be filed herein.

George J. Francis, Attorney for Appellants.

[fol. 1206] [File endorsement omitted]

[fol. 1207]

In the United States Court of Appeals

For the Tenth Circuit

Nos. 7621 to 7626, inclusive

Raymond Dennis, et al., Appellants,

v.

United States of America, Appellee.

Supplement to the Petition for Rehearing—
Filed June 7, 1965

Pursuant to the request for leave filed June 1, 1965, the appellants submit this supplement to the petition for rehearing, now pending, in order to call the attention of the Court to *Baxa* v. *United States*, —— U.S. ——, No. 957, October Term, 1964, decided on May 24, 1965 (33 L.W. 3375).

The appellants respectfully suggest that the Supreme Court's decision in the *Baxa* case governs and requires reversal of the judgments herein, on the first ground specified in the petition for rehearing (pp. 1-2).

The *Baxa* case involved a prosecution for conspiracy (18 U.S.C. 371) to commit the offense of stealing goods from the stream of interstate commerce (18 U.S.C. 659). As the alleged conspirators were being apprehended by agents of the Federal Bureau of Investigation, one of them made self-incriminatory statements such as: "It's sure true what they say about crime doesn't pay," and "If you play the game, you have got to pay."

The trial court in the *Baxa* case, as in the present case, instructed the jury that, once a defendant's membership in the conspiracy was shown, then the acts or statements of [fol. 1208] other members in furtherance of the conspiracy might be considered, even though the particular defendant was not present when they transpired. The trial court in the *Baxa* case, again as in the present case, then allowed the jury to consider the self-incriminatory statements without instructing the jury to consider those statements only against the particular defendant who had made them, even though the statements were plainly not in furtherance of the conspiracy.

The Court of Appeals for the Seventh Circuit affirmed the judgments of conviction, 340 F. 2d 259. In response to a petition for certiorari, the Solicitor General of the United States recommended that the petition be granted and the case remanded for a new trial, confessing error with respect to the trial court's instructions regarding the incriminatory statements, on two grounds:[1]

> "First, it seems probable that, at the time these conversations took place, the conspiracy was at an end, since all of its members had been apprehended (if not formally arrested) by the F.B.I. Second, even if the conspiracy was still going on, Scheri's admissions were not "made pursuant to and in furtherance of [its] objectives." *Krulewitch* v. *United States,* 336 U.S. 440,

[1] *Baxa* v. *United States,* No. 957, October Term, 1964, Memorandum for the United States on Petition for Certiorari, pp. 8-9.

442-443. There is no indication that the statements were made with a view to shielding Scheri's co-conspirators or throwing the investigators off the track. Thus, here, as in *Fiswick* v. *United States*, 329 U.S. 211, 217, "confession or admission by one co-conspirator after he [had] been apprehended [was] not in any sense a furtherance of the criminal enterprise." Accordingly, the testimony was inadmissible against Scheri's co-conspirators, none of whom was present at the time the statements were made."

It will be seen that the second ground on the basis of which the Solicitor General confessed error is precisely the same as the first ground specified in the appellants' [fol. 1209] petition for rehearing in the present case. In the *Baxa* case, as here, the trial court left it to the jury to decide whether or not statements by one alleged conspirator were or were not in furtherance of the conspiracy, so as to qualify them for consideration against the other defendants. The trial court's failure in the *Baxa* case to give the jury the proper limiting instructions with respect to declarations by one of the defendants, not in the presence of the others and not in furtherance of the conspiracy, constitutes precisely the same error that is complained of in the present case and which, as we have pointed out in the petition for rehearing (p. 1), is clearly contrary to the rule stated in *United States* v. *Guido*, 161 F. 2d 492, 494-95 (C.C.A. 3).

In the appellants' brief on this appeal (p. 28) and again in the petition for rehearing (p. 1), this Court's attention was likewise called to the dictum in *Fiswick* v. *United States*, 329 U.S. 211 at 217. Now, the Supreme Court's decision in the *Baxa* case constitutes a square and governing holding on this point, inasmuch as the Supreme Court granted certiorari and reversed the judgment of conviction in the *Baxa* case, in a *per curiam* opinion (33 L.W. 3375) as follows:

"957 Baxa v. U.S. Per Curiam. The petition for writ of certiorari is granted. On consideration of the confession of error by the Solicitor General and upon examination of the entire record, the judgment is vacated and the case is remanded to the United States District Court for the Southern District of Illinois for a new trial."

Wherefore, the appellants respectfully renew their prayer that this Court reconsider its opinion and judgments affirming the convictions and reverse said judgments, [fol. 1210] or, in the alternative, that this Court order reargument on the questions specified in the petition for rehearing and in this supplement.

Respectfully submitted,

George J. Francis, 817 Farmers Union Bldg., Denver 3, Colorado; Telford Taylor, 200 Park Avenue, New York 17, N. Y.; Nathan Witt, P. O. Box 156, New York 23, N. Y.; Attorneys for Appellants.

Taylor, Scoll, Ferencz & Simon, 200 Park Avenue, New York 17, N. Y., Of Counsel.

Certificate

Appellants, by their attorneys, hereby certify that the foregoing supplement to the petition for rehearing is not presented for the purpose of vexation and delay, but is, in the opinion of counsel, well founded law and proper to be filed herein.

Nathan Witt, Attorney for Appellants.

[fol. 1211] [File endorsement omitted]

[fol. 1212]

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Nos. 7621 to 7626, inclusive

RAYMOND DENNIS, et al., Appellants,

—v.—

UNITED STATES OF AMERICA, Appellee.

SECOND SUPPLEMENT TO THE PETITION FOR REHEARING—
Filed June 11, 1965

Pursuant to the request for leave filed June 7, 1965, the appellants submit this second supplement to their petition for rehearing, now pending, in order to call the attention of this Court to *United States* v. *Archie Brown*, —— U.S. ——, No. 399, October Term, 1964 decided June 7, 1965, 33 LW 4603.

The appellants respectfully suggest that the Supreme Court's decision in the *Brown* case governs and requires reversal of the judgments herein, on the ground that Section 9(h) of the Taft-Hartley Act (29 U.S.C. 159(h), repealed in 1959), pursuant to which the indictment in the present case was brought, is unconstitutional under Article I, Section 9 of the Constitution of the United States.

From the inception of this proceeding, and both on this appeal and on appeal from the first judgments herein, appellants have challenged the constitutionality of Section 9(h) of the Taft-Hartley Law. In the third paragraph of its opinion on this appeal, this Court recognized that appellants have perpetuated "the attack on . . . the constitu-
[fol. 1213] tionality of 9(h) of the National Labor Relations Act". On neither appeal was the point briefed or argued, because the matter appeared to be foreclosed in this Court by *American Communications Association* v.

Douds, 339 U.S. 382, and subsequent decisions by this Court affirming convictions under Section 9(h). The point was preserved, as appellants stated in their briefs, so that it might be reviewed in the Supreme Court.

When the present appeal was argued to this Court last January, counsel for appellants called attention to the pendency in the Supreme Court of the *Brown* case, and to the possibility that the decision might embody holdings or statements which would govern or be germane to the disposition of the present appeal. That possibility has now materialized.

The Court of Appeals for the Ninth Circuit in the *Brown* case (334 F. 2d 488) held Section 504 of the Labor-Management Reporting and Disclosure Act unconstitutional under the First and Fifth Amendments to the Constitution, on grounds which that court thought distinguishable from the *Douds* case. It is for that reason that appellants in the present case, on argument in January, were unable to say that the Supreme Court's decision in the *Brown* case would necessarily affect the disposition of the present case.

However, the Supreme Court has now held Section 504 of the Labor-Management Act unconstitutional as a bill of attainder under Article I Section 9 of the Constitution, on grounds which are plainly inconsistent with the decision in the *Douds* case. Indeed, the opinion of the Court (per Chief Justice Warren) all but explicitly overrules the *Douds* case, by stating that "the Bill of Attainder Clause was consistently interpreted by this Court—until the deci- [fol. 1214] sion in *American Communications Association* v. *Douds* . . ." and that "the Court in *Douds* misread *United States* v. *Lovett*", while stating also that: "This case is not necessarily controlled by *Douds*".

This last statement, however, is obviously inserted only *ex multa cautela*, inasmuch as the reasoning in the Court's opinion is undeniably applicable to Section 9(h) of the Taft-Hartley Law. The dissenting opinion (per Mr. Justice White, for himself and Justices Clark, Harlan, and Stew-

art) explicitly states that the *Douds* case "is obviously overruled".

Appellants do not know what position the Government will take on the questions now newly raised here in consequence of the *Brown* case. We respectfully remind this Court that, after the decision in *Yates* v. *United States*, 354 U.S. 298, the Supreme Court remanded other Smith Act cases then pending there for reconsideration in the light of that decision, and that several Courts of Appeal on their own motion reconsidered the Smith Act cases then pending before them. It may well be that the Supreme Court, should it review the present case, would wish to have the benefit of this Court's opinion on the constitutional issues.

WHEREFORE, appellants respectfully renew their prayers set forth in the petition for rehearing and the supplement [fol. 1215] thereto, as augmented by the considerations set forth herein.

Respectfully submitted,

George J. Francis, 670 Capitol Life Center, Denver 3, Colorado;

Telford Taylor, 200 Park Avenue, New York 17, N. Y.;

Nathan Witt, P. O. Box 156, New York 23, N. Y., Attorneys for Appellants.

Taylor, Scoll, Ferencz & Simon, 200 Park Avenue, New York 17, N. Y., Of Counsel.

Certificate

Appellants, by their attorneys, hereby certify that the foregoing supplement to the petition for rehearing is not presented for the purpose of vexation and delay, but is, in

the opinion of counsel, well founded law and proper to be filed herein.

George J. Francis, Attorney for Appellants.

A true copy.

Teste.

Robert B. Cartwright, Clerk.

[fol. 1216]

[File endorsement omitted]

LETTER FROM ASSISTANT UNITED STATES ATTORNEY TO CLERK, U.S.C.A.—10TH CIRCUIT—Filed June 23, 1965

15124

DPMacD:dt

June 10, 1965

Mr. Robert B. Cartwright
Clerk, Court of Appeals
200 Post Office Building
Denver, Colorado

Re: Dennis, et al. v. United States.
Nos. 7621-7626, Incl.

Dear Mr. Cartwright:

On the 6th of May, 1965, appellants filed a petition for rehearing in the above case, and on the 3d of June they filed a supplemental petition for rehearing. On the 7th of June, appellants requested leave to file a second supplementary petition for rehearing on the alleged grounds the June 7, 1965 decision of the United States Supreme Court in *United States* v. *Archie Brown*, (No. 399 Oct. Term 1964), is pertinent.

The government is of the opinion that the proposed second supplemental petition for rehearing would serve

the court no useful purpose. Accordingly, it is urged that the leave requested be denied.

For the court's information, the subject decision relates to Section 504 of the Landrum-Griffin Act rather then Section 9(h) of the Taft-Hartley Act, which formed the ultimate basis for the indictment in the subject case. For appellants to ask the court to speculate on its effect with respect to the constitutionality of said Section 9(h), particularly in the face of *American Communications Association* v. *Douds*, 339 U.S. 382, would appear to represent an extraordinary request totally uncontemplated by this court's rules.

[fol. 1217] Appellants, after admitting to not having so much as seen the *Brown* opinion, categorically state it either overrules or casts serious doubt upon the *Douds* decision. Appellee having had the opportunity to read the *Brown* opinion now urges a denial of leave to file the requested supplement, a position it would not feel free to take had appellants' surreptitious assertions had the benefit of basis in fact.

Very truly yours,

DONALD P. MACDONALD
Assistant United States Attorney

cc: George J. Francis, Esquire
Farmers Union Bldg.
Denver, Colorado

[fol. 1218]

IN THE UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 7621-7626, Inclusive

RAYMOND DENNIS, et al., Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

APPELLEE'S MEMORANDUM IN OPPOSITION TO SUPPLEMENT TO PETITION FOR REHEARING—Filed June 23, 1965

The following opposition to the supplemental petitions for rehearing tendered on behalf of appellants is submitted pursuant to a request for leave filed with this Court on June 21, 1965. Its purpose is to suggest to the Court that all arguments and such issues as are allegedly raised thereby in said supplemental petitions were resolved by the Court heretofore. Some response, however, was indicated in view of appellants' persistent refusal to relate a fair statement of such facts as are pertinent to the question which they attempt to raise.

[fol. 1219] Appellants' supplemental petition of June 3, 1965, relies on an Order of the Supreme Court of the United States dated May 24, 1965, wherein the decision in *Baxa* v. *United States*, 340 F.2d 259 (7th Cir. 1965), was vacated, 33 U.S. L.Week 3375, on examination of the record and in consideration of a confession of error by the Solicitor General of the United States.

The controlling facts in the *Baxa* case bear no relationship to the facts before the Court. Simply stated, in *Baxa*, the jury was permitted to consider a statement of a coconspirator made at or about the moment of his arrest as binding upon all the defendants whether or not they were present when the statement was made, without a proper

limiting instruction. For all intents and purposes, the conspiracy was at an end when the statement in question was made. Conversely, no analogous statements appear in the instant proceeding. No statements subsequent to the completion of the conspiracy were tendered by the government in the course of prosecution.

[fol. 1220] Further, the *Baxa* case adds nothing to the arguments repeatedly urged by appellant. At best it is cumulative of the numerous authorities cited previously in support of the well settled rule that admissions or declarations by one conspirator after the conspiracy has run its course and has ended, are not, as a matter of law, admissible against those who are alleged to have been his co-conspirators. Now, as before, appellants are placing their reliance on *Fiswick* v. *United States*, 329 U.S. 211, and *United States* v. *Guido*, 161 F.2d 492 (3d Cir., 1947).[1] Their reliance upon *Baxa* adds nothing to their previous arguments.

Finally, their effort to equate the instruction in *Baxa* with the pertinent instruction given by the trial court herein is woefully misplaced. The *Baxa* instruction, as quoted in *Baxa* v. *United States*, 340 F.2d 259 (7th Cir. 1965), bears little resemblance to the instruction as related and approved by this court at pages 11 and 12 of its opinion herein.

[fol. 1221] In conclusion, it is suggested that appellants have failed to perceive the true nature of the instruction and have completely misunderstood the Court's opinion. Nonetheless, they attempt to bolster a defective argument by repetition. It cannot be done.

The second tendered supplement to appellants' petition for rehearing urges the Court to reconsider its acceptance of the constitutionality of Section 9(h) of the Taft-Hartley Act (29 U.S.C. 159(h)) in light of *United States* v. *Archie Brown*, No. 399, October Term, 1964, 33 U.S. L.Week 4603. As indicated in appellee's letter of June 14, 1965, opposing

---

[1] See page 28 of Appellants' Brief, and page 1 of Appellants' Petition for Rehearing.

the acceptance of the tendered supplement, it is the government's unqualified position that the *Brown* decision is of no consequence in the instant proceeding.

The Supreme Court in its wisdom was unable to agree in the *Brown* matter, as reflected by the dissenting opinion of Justice White, with whom Justices Clark, Harlan and Stewart joined. A basic disagreement between the majority and the minority was the possible effect on the principles laid down in *American Communications* v. *Douds*, 339 [fol. 1222] U.S. 382. It is patently clear, however, that the Court was unanimous that its decision in *Douds* should remain the law of the land. The majority took great care to expressly point out that the facts before it in *Brown* were dissimilar from *Douds* and thereby not controlled by it. The minority disagreed, urging the Court to sustain Section 504 on the basis of its opinion in *Douds*. Contrary to appellants' contention, a careful reading of the Supreme Court's *Brown* opinion renders inescapable the conclusion that *Douds* has been reaffirmed. To ask the Court to now disregard the *Douds* rule is unprecedented.

In addition to the inapplicability of the *Brown* decision to the case before the Court, there is further justification for summary disposition of the second supplement tendered by appellants. From the facts as proved, each appellant was aware of and submitted himself to the requirements of Section 9(h) of the Taft-Hartley Act, and during the life thereof was bound to comply or suffer the consequences. Nonetheless, they knowingly conspired to file false affidavits with an agency of the United States and may not now defend that the act is unconstitutional. *Humble Oil & Re-* [fol. 1223] *fining Co.* v. *United States*, 198 F.2d 753, 756, (10 Cir. 1952), *certiorari* denied, 344 U.S. 909. See, to the same effect, *United States* v. *Barra*, 149 F.2d 489 (2d Cir. 1945), and *Ogden* v. *United States*, 303 F.2d 724 (9 Cir. 1962). One must remember that in return for the filing of false affidavits, appellants and the union which they represented received the benefits of the facilities of the National Labor Relations Board. It is submitted that in making

available the facilities of a regulatory agency, Congress was entitled to secure protection against false and misleading representations while the act was being administered. *Kay v. United States*, 303 U.S. 1 (1938).

"* * * When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction."

[fol. 1224]

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING—June 28, 1965

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett and Honorable Delmas C. Hill, Circuit Judges.

These causes came on to be heard on the petition of appellants for a rehearing herein and were submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

NOTE RE STAY OF MANDATE

By order of June 30, 1965, the mandate of the United States Court of Appeals was stayed for a period of sixty days under provision of paragraph 3 of rule 28 of said court.

[fol. 1225] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1226]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1965

RAYMOND DENNIS, et al., Petitioners,

vs.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—July 12, 1965

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 27, 1965.

Byron R. White, Associate Justice of the Supreme Court of the United States.

Dated this 12 day of July, 1965.

[fol. 1227]

SUPREME COURT OF THE UNITED STATES

No. 502, October Term, 1965

RAYMOND DENNIS, et al., Petitioners,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—November 15, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted limited to Questions 1, 2 and 3 presented by the petition, which read as follows:

"1. Whether the indictment states the offense of conspiracy to defraud the United States;

"2. Whether, in the comparative light of American Communications Ass'n. v. Douds, 339 U.S. 382, and United States v. Archie Brown, 381 U.S. 437, Section 9(h) of the Taft-Hartley Act is constitutional;

"3. Whether the trial court erred in denying petitioners' motions for the production, to the defense or the Court, of grand jury testimony of prosecution witnesses."

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 26 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 502

RAYMOND DENNIS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TAYLOR, SCOLL, FERENCZ & SIMON,
200 Park Avenue,
New York, N. Y. 10017.

NATHAN WITT,
P. O. Box 156,
New York, N. Y. 10023.

GEORGE J. FRANCIS,
670 Capitol Life Center,
Denver, Colorado 80203.

Attorneys for Petitioners.

TELFORD TAYLOR,
of Counsel.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	7
1. Insufficiency of the Indictment	8
2. Constitutionality of Section 9(h)	11
3. Access to Grand Jury Testimony of Prosecution Witnesses	12
4. Exclusion of Business and Government Records	16
5. Vicarious Admissions	20
6. Accomplice Testimony	23
7. Admission of Testimony Given at Previous Trial By a Witness Subsequently Deceased	24
8. Insufficiency of the Evidence	28
Conclusion	32
Appendix A—Judgment Below	1a
Appendix A1—Opinion Below	2a
Appendix A2—Opinion Below, Reversing Petitioners' First Conviction	21a
Appendix A3—Opinion of District Court, Denying Motion to Dismiss the Indictment	37a
Appendix B—Statutes Involved	45a

Citations

CASES: PAGE

Alford v. United States, 282 U. S. 687 28
Amalgamated Meat Cutters v. National Labor Relations Board, 352 U. S. 153 10
American Communications Association v. Douds, 339 U. S. 382 ..... 2, 7, 8, 11, 12
Aptheker v. Secretary of State, 378 U. S. 500 .... 11, 12

Bary v. United States, 292 F. 2d 53 ..... 14, 25
Baxa v. United States, 381 U. S. 353 ..... 5, 22
Berry v. United States, 295 F. 2d 192 14
Bishop v. United States, 243 F. 2d 32 24
Brady v. Maryland, 373 U. S. 83 26
Bridges v. United States, 346 U. S. 209 ..... 4, 8, 9, 10
Brilliant v. United States, 297 F. 2d 385 14
Brown v. United States, 334 F. 2d 488 11

Campbell v. United States, 365 U. S. 85, 373 U. S. 487 ..... 25, 26
Carbo v. United States, 314 F. 2d 718 21
Cole v. Arkansas, 333 U. S. 196 11

DeBinder v. United States, 292 F. 2d 737 16
Dennis v. United States, 302 F. 2d 5 ..... 1, 4, 9, 24
Dennis v. United States, 346 F. 2d 10 1
Dunn v. United States, 318 F. 2d 89 24

Farkas v. United States, 2 F. 2d 644 28
Fiswick v. United States, 329 U. S. 211 22
Freed v. United States, 266 Fed. 1012 24

Gordan v. United States, 299 F. 2d 117, 313 F. 2d 582 ..... 14, 16

Hance v. United States, 299 F. 2d 389 14
Harrell v. United States, 317 F. 2d 580 14
Herzog v. United States, 226 F. 2d 561, 235 F. 2d 664 14

PAGE

Cases (Cont'd):

Hilliard v. United States, 317 F. 2d 150 26
Hines v. United States, 220 F. 2d 381 18
Hull v. United States, 324 F. 2d 817 24

Ingram v. United States, 360 U. S. 672 .....3, 30, 31
International Indemnity Co. v. Lehman, 28 F. 2d 1 22

Jencks v. United States, 353 U. S. 657 ..... 13, 16

Kotteakos v. United States, 328 U. S. 750 ..... 3, 30

Leedom v. International Union of Mine, Mill and Smelter Workers, 352 U. S. 145 ..... 9, 10
Logan v. United States, 144 U. S. 263 22

Marzani v. United States, 168 F. 2d 133 9
Mattox v. United States, 156 U. S. 237 24
M'Ginniss v. United States, 256 Fed. 621 24
Mine Workers v. Arkansas Flooring Co., 351 U. S. 62 20

Noto v. United States, 367 U. S. 290 11

Osman v. Douds, 339 U. S. 846 11

Palmer v. Hoffman, 318 U. S. 109 18
Phelps v. United States, 252 F. 2d 49 24
Pittsburgh Plate Glass Co. v. United States, 360 U. S. 395 .....13, 14, 16
Pulley v. United States, 253 F. 2d 796 18

Sandroff v. United States, 158 F. 2d 623 28
Saunders v. United States, 316 F. 2d 346 27
Scales v. United States, 367 U. S. 203 11
Simmons v. United States, 308 F. 2d 324 14
Smith v. Bear, 237 F. 2d 79 18
Spaeth v. United States, 232 F. 2d 776 28

Travis v. United States, 269 F. 2d 928, reversed, 364 U. S. 631 .....15, 25, 27
Travis v. United States, 363 U. S. 801, 364 U. S. 631 .....6, 13, 27

PAGE

CASES (Cont'd):

Twomley v. Central Park N. & E. R. R.R., 69 N. Y. 158 20

United States v. Agueci, 310 F. 2d 817 ..... 30, 31
United States v. Aviles, 274 F. 2d 179 31
United States v. Bentvena, 319 F. 2d 916 31
United States v. Bertucci, 333 F. 2d 292 14
United States v. Borelli, 336 F. 2d 376 30
United States v. Boyance, 329 F. 2d 372 14
United States v. Brown, 381 U. S. 437 .....2, 5, 8, 11, 12
United States v. Coduto, 284 F. 2d 464 14
United States v. Dennis, 183 F. 2d 201 21
United States v. Eisenberg, 238 F. 2d 143 18
United States v. Giampa, 290 F. 2d 83 14
United States v. Grainger, 346 U. S. 235 9
United States v. Guido, 161 F. 2d 492 22
United States v. Hall, 200 F. 2d 957 18
United States v. Hernandez, 282 F. 2d 71 14
United States v. Keegan, 331 F. 2d 257 14
United States v. Lovett, 328 U. S. 303 12
United States v. Lurie, 222 F. 2d 11 9
United States v. Masino, 275 F. 2d 129 24
United States v. McElvain, 272 F. 2d 633 9
United States v. McKeever, 271 F. 2d 669 ..... 14, 16
United States v. Micele, 327 F. 2d 222 14
United States v. Persico, 305 F. 2d 534 24
United States v. Pezzati, 160 F. Supp. 787 ..... 1, 4, 9
United States v. Spangelet, 258 F. 2d 338 ..... 14, 16
United States v. Tommasello, 160 F. 2d 348 9
United States v. Zborowski, 271 F. 2d 661 16
Wesson v. United States, 164 F. 2d 50 9
West v. United States, 274 F. 2d 885 10
Williams v. United States, 328 F. 2d 178 26
Williamson v. United States, 332 F. 2d 123 24

PAGE

CONSTITUTION OF THE UNITED STATES:

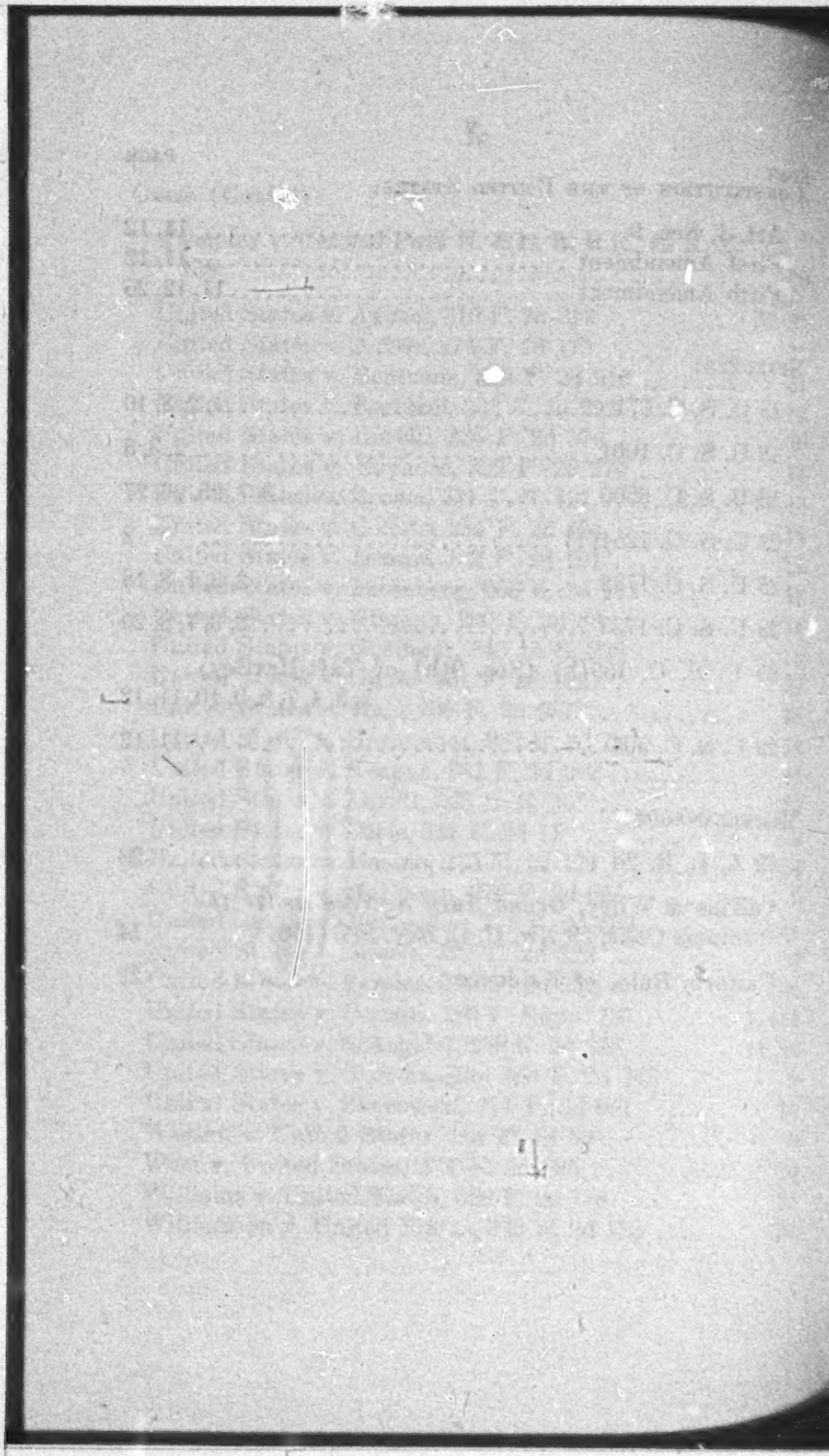
Art. I, Sec. 9 ..... 11, 12
First Amendment 11, 12
Fifth Amendment 11, 12, 26

STATUTES:

18 U. S. C. 371 ..... 1, 2, 3, 10
18 U. S. C. 1001 ..... 2, 3, 8
18 U. S. C. 3500 ..... 3, 7, 25, 26, 27
28 U. S. C. 1254(1) 2
28 U. S. C. 1732 ..... 2, 3, 7, 8, 18
28 U. S. C. 1733 ..... 2, 3, 7, 8, 20
29 U. S. C. 159(h) (Sec. 9(h) of Taft-Hartley) 2, 3, 4, 7, 8, 9, 10, 11, 12
29 U. S. C. 504 ..... 11, 12

MISCELLANEOUS:

62 A. L. R. 2d 28
Calkins & Wiley, *Grand Jury Secrecy under the Illinois Code*, 59 Nw. U. L. Rev. 577 (1964) 14
Uniform Rules of Evidence 22



IN THE

Supreme Court of the United States

October Term, 1965

No.

RAYMOND DENNIS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on April 26, 1965, affirming judgments of the District Court for the District of Colorado, entered upon a jury verdict, convicting petitioners of conspiracy to defraud the United States, in violation of the general conspiracy statute, 18 U. S. C. 371.

Opinion Below

The opinion of the court below supporting the judgment sought to be reviewed (*infra*, App. A1, pp. 2a-20a) is reported at 343 F. 2d 10. The opinion of the court below reversing the judgments of conviction against petitioners at their first trial under the indictment (*infra*, App. A2, pp. 21a-36a) is reported at 302 F. 2d 5. The opinion of the District Court for the District of Colorado denying the defendants' motion to dismiss the indictment (*infra*, App. A3, pp. 37a-44a; R. 13-19) is reported at 160 F. Supp. 787.

Jurisdiction

The judgment of the Court of Appeals was entered on April 26, 1965 (*infra*, App. A, p. 1a). A petition for rehearing and two supplements thereto were denied on June 28, 1965. By order of Mr. Justice White, the time for filing a petition for certiorari was extended to August 27, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

Petitioners and others were indicted in 1956 under the fraud clause of the general conspiracy statute (18 U. S. C. 371) for conspiring to defraud the United States by causing to be filed with the National Labor Relations Board false affidavits denying membership in and affiliation with the Communist Party. The affidavits were filed pursuant to Section 9(h) of the Taft-Hartley Act, 29 U. S. C. 159(h), repealed in 1959, which made applicable to such affidavits the provisions of the so-called "false statements" statute, 18 U. S. C. 1001. The questions are:

(1) Whether the indictment states the offense of conspiracy to defraud the United States;

(2) Whether, in the comparative light of *American Communications Ass'n* v. *Douds*, 339 U. S. 382, and *United States* v. *Archie Brown*, 381 U. S. 437, Section 9(h) of the Taft-Hartley Act is constitutional;

(3) Whether the trial court erred in denying petitioners' motions for the production, to the defense or the court, of grand jury testimony of prosecution witnesses;

(4) Whether the trial court erred in excluding documentary evidence offered by the defense under the business records and other federal statutes, 28 U. S. C. 1732-33;

(5) Whether the petitioners were otherwise denied a fair trial by the trial court's (a) instructions to the jury with respect to "vicarious admissions" and the weight to be given the testimony of alleged accomplices and (b) admission of testimony given at petitioners' first trial by a prosecution witness who died prior to their second trial, in view of rulings at the first trial (under 18 U. S. C. 3500 and otherwise) which limited cross-examination of the witness; and

(6) Whether the evidence is sufficient to support the judgments of conviction of conspiracy under the standards prescribed in *Ingram* v. *United States*, 360 U. S. 672, *Kotteakos* v. *United States*, 328 U. S. 750, and other decisions of this Court.

Statutes Involved

The relevant provisions of the Constitution of the United States, the "false statements" act (18 U. S. C. 1001), the National Labor Relations Act as amended by the Labor-Management Relations Act of 1947 (29 U. S. C. 159), the federal conspiracy statute (18 U. S. C. 371), the federal business records and government records acts (28 U. S. C. 1732-33), and the "Jencks" Act (18 U. S. C. 3500), are set forth in Appendix B, *infra*, pp. 45a-49a.

Statement of the Case

The one-count indictment (R. 3-8), returned November 16, 1956, in the United States District Court for the District of Colorado, charged the six petitioners and eight others with conspiracy to defraud the government, in violation of the fraud clause of the general conspiracy statute (18 U. S. C. 371). All of the defendants were or had been officers or staff employees of the International Union of Mine, Mill and Smelter Workers, hereinafter called "Mine-Mill".

Section 9(h) of the Taft-Hartley law provided that labor unions desiring to use the facilities of the National Labor Relations Board must establish a compliance status, for which it was required that affidavits by the union's "officers", denying membership in or affiliation with the Communist Party,[1] be on file with the Board. The gravamen of the charge in the indictment is that the accused conspired to defraud the United States by effecting Mine-Mill's compliance, through having those defendants who were Mine-Mill officers file affidavits falsely denying that they were members of or affiliated with the Communist Party. The affidavits in question were filed from 1949 to 1955 (R. 6-7).

The defendants moved to dismiss the indictment on the grounds, *inter alia*, that Section 9(h) was unconstitutional, that the prosecution was in part barred by the statute of limitations, and that the indictment failed to state the offense of conspiracy to defraud the government within the rule of *Bridges* v. *United States*, 346 U. S. 209. This motion was denied in March, 1958. *United States* v. *Pezzati*, 160 F. Supp. 787.

Eleven of the accused stood trial in 1959 and nine were convicted.[2] In March, 1962, the Court of Appeals reversed the judgments of conviction with instructions to dismiss the indictment as to two of the defendants. *Dennis* v. *United States*, 302 F. 2d 5; *infra*, App. A2, pp. 21a-36a. The seven remaining defendants were tried again in 1963; the jury acquitted one and convicted the six petitioners. The Court of Appeals affirmed the judgments of conviction and denied

---

[1] Section 9(h) also required that the affidavits deny "belief in" and "support of" any organization teaching violent overthrow of the United States government, but the indictment does not involve that part of the statute, and the jury was so instructed (R. 1017).

[2] Three of the 14 accused pleaded *nolo contendere*, and two were acquitted by direction of the trial judge at the close of the government's case.

a petition for rehearing timely filed, and supplemented following the decisions of this Court in *Baxa* v. *United States*, 381 U. S. 353, decided May 24, 1965, and *United States* v. *Archie Brown*, 381 U. S. 437, decided June 7, 1965.

Mine-Mill is a union operating in the non-ferrous metals field. Its compliance with the Taft-Hartley filing requirements and use of the Board's facilities are not disputed. Nor is it disputed that non-Communist affidavits were made and filed by the four petitioners who were officers of Mine-Mill during the period covered by the indictment.[3]

The prosecution's evidence of conspiracy among the defendants was intended to establish that:

(1) Following enactment of the Taft-Hartley Law in 1947, Communist Party policy opposed compliance;

(2) The defendants were then members of the Communist Party, and caused Mine-Mill to follow the Communist policy of non-compliance;

(3) In 1949, the Communist Party changed its policy and instructed Party members who were union officers to file non-Communist affidavits, and to resign formally from the Party but retain a clandestine membership;

(4) In accordance with the new Party policy, Mine-Mill officers filed non-Communist affidavits and the union obtained compliance status;

---

[3] One of the petitioners (Sanderson) has never been an officer, and another (Skinner, now the president, R. 834) was not an officer during the indictment period. Two others (Dennis and Dichter) became and still are officers and filed affidavits during the indictment period, but were not such at the time (June, 1949) that the conspiracy is alleged to have been formed. The other two (Travis and Wilson) were officers and filed affidavits at that time; Wilson ceased to be an officer in 1953, but is still an employee of Mine-Mill, while Travis ceased to be an officer or in any way connected with Mine-Mill in 1955.

(5) The defendants at that time (July, 1949) agreed that the union officers among them would secretly remain Party members and would file false affidavits; and

(6) That agreement (*i.e.* the conspiracy) continued and was executed by repeated false filings up to the time of the indictment.

It is not disputed that Mine-Mill opposed the Taft-Hartley law and did not comply with the filing provisions until July, 1949, when, by Executive Board action, the union decided to comply. This decision was ratified in September at the union's annual convention (R. 711).

Direct evidence of conspiracy among the defendants is entirely lacking. As indirect evidence, the prosecution relied chiefly on the asserted "parallelism" between Communist Party and Mine-Mill policies with respect to compliance, on testimony concerning statements by petitioners Travis and Wilson in 1949, and especially on a public statement by Travis in August, 1949, that he had been a member of the Communist Party and had resigned from it "in order to make it possible for me to sign the Taft-Hartley affidavit" (G. Ex. 8).[4]

Other prosecution evidence is described in subsequent portions of this petition relating to the evidentiary questions presented (*infra*, pp. 16-31).

Defense witnesses testified that Mine-Mill policies with respect to compliance and non-compliance were determined freely, openly and democratically. Trade union reasons for these policies were described by the defense witness John Clark, who was secretary-treasurer of the union in 1948 and president from 1948 to 1963 (R. 794-809).

---

[4] Travis was indicted for and convicted of the substantive offense of filing false affidavits, but, after two trials, his convicion was set aside by this Court on the ground of improper venue. *Travis* v. *United States*, 364 U. S. 631. He was not thereafter reindicted.

As additional evidence against the "parallelism" inference relied on by the prosecution, the defense offered an authenticated National Labor Relations Board tabulation (Defs. Ex. Y) showing that many other labor organizations followed substantially the same compliance policies and at the same time (R. 908-09). To contradict prosecution testimony particularly implicating petitioners Travis, Dennis and Dichter, the defense offered Dichter's travel and per diem vouchers, to establish what amounted to an alibi (Defs. Exs. Q-1 to Q-5 for Ident., inclusive; R. 771-74). The exclusion of these documents by the trial court raises important questions under the federal business records and government records statutes, 28 U. S. C. 1732-33.

In the course of trial, the district court denied defense motions for production (alternatively to the defense or to the court for *in camera* inspection) of the grand jury testimony of three prosecution witnesses (R. 106-09, 494-95, 581, 618-19, and 645). The court likewise admitted the record of testimony given at the first trial by the subsequently deceased government witness Mason, overruling defense objections based on rulings made at the first trial, under 18 U. S. C. 3500 and otherwise, which had deprived the defense of full opportunity to cross-examine Mason at the first trial (R. 129-30 and 280-408).

In charging the jury, the district judge failed to instruct them that fraud was an essential element of the offense charged (R. 1008-09), to limit the jury's permissible consideration of "vicarious admissions" including many which were not in furtherance of the alleged conspiracy (R. 1012-13), or to caution them with respect to the consideration of testimony by accomplices (No. 5, R. 1120).

Reasons for Granting the Writ

Petitioners have been convicted pursuant to Section 9(h) of the Taft-Hartley law, the constitutionality of which was sustained in *American Communications Ass'n* v.

Douds, 339 U. S. 382. The authority of the *Douds* case was seriously shaken if not entirely destroyed by the decision in *United States* v. *Archie Brown*, 381 U. S. 437, decided June 7, 1965, and the constitutionality of Section 9(h) thus presents an important question. We doubt, however, that it is necessary for the Court to reach the constitutional question, inasmuch as the indictment, charging as it does a conspiracy to defraud the United States but setting forth merely a conspiracy to commit an offense of which fraud is not an element, fails to state the offense charged and must be dismissed under the rule of *Bridges* v. *United States*, 346 U. S. 209.

Beyond these questions pertaining to the constitutional and statutory validity of the indictment, the trial of this cause precipitated procedural and evidentiary issues which are basic to the fair administration of criminal justice. Several of the rulings below, including those denying defense motions for production of grand jury testimony of prosecution witnesses for impeachment, excluding union and government records offered under the federal business and government records statutes, declining to rule that certain statements were not in furtherance of the conspiracy, and declining to caution the jury with respect to the testimony of alleged accomplices, are in conflict with decisions of other courts of appeals. These and other rulings are likewise contrary to the applicable decisions of this Court.

1. *Insufficiency of the Indictment.* The indictment explicitly charges a conspiracy to defraud the United States by fraudulently obtaining for Mine-Mill the services and facilities of the National Labor Relations Board (R. 4). However, the only conduct alleged is a conspiracy to file false affidavits, and, under the provisions of 9(h), filing a false affidavit was made a violation of 18 U. S. C. 1001, the false statements act. This Court has doubted that fraud is an essential element of the offense condemned by

that act. *United States* v. *Grainger*, 346 U. S. 235, 241-43. The Court of Appeals for the Seventh Circuit held that fraud is *not* such an element in *United States* v. *Lurie*, 222 F. 2d 11; see also *United States* v. *Tommasello*, 160 F. 2d 348, 350 (C. C. A. 2); *Wesson* v. *United States*, 164 F. 2d 50 (C. C. A. 8); *Marzani* v. *United States*, 168 F. 2d 133 (C. A. D. C.), aff'd by an equally divided Court, 335 U. S. 895 and, upon rehearing, 336 U. S. 922.

The fact that the indictment is "framed" in the language of conspiracy to defraud is irrelevant where such language "merely cloaks a factual charge" of an offense in which fraud is not an essential element. *Bridges* v. *United States*, 346 U. S. at 223-24; *United States* v. *Lurie*, *supra*; *cf. United States* v. *McElvain*, 272 U. S. 633, 639. The district court sustained the indictment on the ground that it specified a conspiracy to defraud (R. 18, and *infra*, App. A3, pp. 37a-44a), disregarding the admonition in the *Bridges* case that the sufficiency of the charge of fraud must be tested by the specific allegations.[5] The decision below, accordingly, is squarely contrary to the rule of the *Bridges* case, the dictum in the *Grainger* case, and the decision of the Court of Appeals for the Seventh Circuit in the *Lurie* case.

Indeed, the element of fraud is even more remote in the present case than in those just cited. In the *Bridges* case, for example, it was charged that fraud was present in fact (*i.e.*, in obtaining naturalization by means of a false statement) even though the relevant section of the Nationality Act applied to all false statements, whether or not fraudulent (346 U. S. at 212-13). But under Section 9(h) a union obtained compliance status by the filing of affidavits, whether true or false; the Board did not rely on the truthfulness of the non-Communist affidavits. *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352

[5] The Court of Appeals sustained the indictment on the basis of the district court's opinion (*infra*, App, A2, p. 22a).

U. S. 145; *Amalgamated Meat Cutters* v. *National Labor Relations Board*, 352 U. S. 153.

No doubt the allegations of this indictment would support a charge under the offense clause of 18 U. S. C. 371, and indeed the indictment was lodged under that clause in the only other conspiracy prosecution under Section 9(h). *West* v. *United States*, 274 F. 2d 885 (C. A. 6), cert. den'd, 365 U. S. 811, 819.[6] Of course, the distinction between conspiracies to defraud and conspiracies to commit offenses, far from being merely technical or formal, has important practical consequences in terms of double jeopardy, the statute of limitations, and other related matters. In view of the lapse of over seven years[7] between the alleged formation of the conspiracy (as well as the first overt acts) and the filing of the indictment, it would appear probable that the government selected the fraud clause with an eye to the statute of limitations. Cf. *Bridges* v. *United States*, *supra*.

That the trial judge himself[8] thought fraud to be irrelevant to the conspiracy alleged is manifest from his charge to the jury, in which he failed to instruct that they would have to find fraud in order to convict, and explicitly instructed the jurors (R. 1009) that the offense would be complete "when it is shown beyond a reasonable doubt that the defendants conspired . . . to file false non-Communist

---

[6] The indictment in the present case was lodged before, and in the *West* case after, this Court's decision in the *Leedom* and *Meat Cutters* cases, *supra*.

[7] Inasmuch as the pertinent statute of limitations was changed from five to three years on September 1, 1954, there is a question which period would properly be applicable to this indictment.

[8] The case was tried before Chief Judge Arraj. The opinion and order denying the motion to dismiss the indictment were entered by the late Chief Judge Knous (R. 13-19; *infra*, App. A3, pp. 37a-44a). The motion was originally argued before then District Judge Breitenstein, who withheld action because of the "serious problems" presented by the motion, and subsequently, upon his confirmation as Circuit Judge, referred the matter to Judge Knous.

affidavits with the National Labor Relations Board, and that at least one overt act was done in furtherance of the conspiracy."[9]

2. *Constitutionality of Section 9(h).* The constitutionality of Section 9(h) of the Taft-Hartley law was challenged soon after its enactment on the grounds, *inter alia*, that it violated Article I, Section 9 (Bill of Attainder) of the Constitution and the First and Fifth Amendments. The law was upheld (with respect to the membership and affiliation portions of the affidavits) against these objections in the *Douds* case, *supra*, Mr. Justice Black dissenting.[10]

The 1959 repeal of Section 9(h) and substitute enactment of Section 504 of the Landrum-Griffin law (29 U. S. C. 504) precipitated the *Archie Brown* case, *supra*, decided at the last term of this Court. In that case the Court of Appeals for the Ninth Circuit had held (334 F. 2d 488) Section 504 unconstitutional under the First and Fifth Amendments, basing its decision principally on *Scales* v. *United States*, 367 U. S. 203, and *Noto* v. *United States*, 367 U. S. 290, and reading those cases as holding that membership in the Communist Party, without accompanying elements of intent and activity, does not provide a constitutionally sufficient ground to support a criminal conviction. At about the same time this Court, in *Aptheker* v. *Secretary of State*, 378 U. S. 500, held Communist membership, without more, insufficient, under the due process

---

[9] On the basis of this charge we argue (*infra*, pp. 30-31, n. 34) that acceptance of the government's theory of conspiracy to defraud would in any event require reversal of the judgments of conviction, inasmuch as on that theory an essential issue was not put to the jury. In fact, the charge authorized the jury to convict of one crime (conspiracy to file false affidavits) on an indictment charging another (conspiracy to defraud). This is a denial of due process. *Cole* v. *Arkansas*, 333 U. S. 196.

[10] Mr. Justice Douglas did not participate, but dissented in the subsequent case of *Osman* v. *Douds*, 339 U. S. 846, 847.

clause of the Fifth Amendment, to support prohibition of the right to travel abroad.

In this Court, the respondent in the *Brown* case relied strongly on the *Aptheker* case and the opinion below, but neither the majority nor minority opinions expressed any views concerning the arguments based on the First and Fifth Amendments. Instead, a majority of the Court held Section 504 unconstitutional as a bill of attainder, on the ground that it designates the Communist Party by name instead of utilizing a general description of the legislatively undesirable characteristics. The Court remarked that the *Brown* case "is not necessarily controlled by *Douds*", but at the same time criticized the *Douds* case as inconsistent with previous interpretations of the bill of attainder clause, and declared that the *Douds* opinion "misread *United States* v. *Lovett*. . . ." (328 U. S. 303). The four dissenting justices expressed the opinion (per Mr. Justice White) that the *Douds* case "is obviously overruled".

This petition is not the appropriate place for extensive analysis of these constitutional problems. It seems apparent that the essential reasoning of the *Aptheker* and *Brown* cases is applicable to and casts grave doubt on the constitutionality of Section 9(h), and that the authority of the *Douds* case has been seriously undermined if not totally destroyed.

Accordingly, if this case is not disposed of under the first ground urged in support of this petition (*i.e.*, the statutory insufficiency of the indictment), it would appear that the constitutional questions require review by this Court. It is true, of course, that Section 9(h) has been repealed, but surely that circumstance could not justify either the conviction or the retrial of these defendants under an indictment based on a statute which violates fundamental constitutional guarantees.

3. *Access to Grand Jury Testimony of Prosecution Witnesses.* At the trial the defense moved for the produc-

tion, for impeachment purposes, of grand jury testimony given by three prosecution witnesses (Locke, Fikes, and Gardner).[11] Alternatively, the defense moved that the trial judge examine the testimony *in camera* and make it available to the defense if inconsistencies between grand jury and trial testimony were discovered. The trial court denied all such motions on the ground that no "particularized need" had been shown (R. 106-09, 494-95, 581, 618-19, and 645). Acknowledging that the practice differed in other circuits, and that it would have been "safer" to grant the request for *in camera* inspection, the Court of Appeals nevertheless affirmed the district court's ruling on the ground that cross-examination of these witnesses had revealed no "manifest inconsistency" (*infra*, App. A1, p. 13a).

This Court last dealt with the question of access to grand jury testimony for impeachment purposes in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395,[12] wherein it was held (360 U. S. at 400) that grand jury minutes should be made available directly to the defense in c[illegible] where a "particularized need" is shown. The Court declined to pass on the duty of the trial judge, absent such a showing, to examine the minutes *in camera*, deeming that question not properly raised (360 U. S. at 401). Four justices dissented and expressed the view (derived from *Jencks* v. *United States*, 353 U. S. 657, 667-69) that since *in camera* inspection by the judge may not sufficiently protect the rights of the accused, the relevant testimony of prosecution witnesses should be produced directly to the defense on request.

---

[11] The denial of a similar motion on the first trial for Mason's grand jury testimony was one of the grounds for objecting to the admission of his first trial testimony on the second trial (*infra*, p. 25).

[12] Questions comparable to those here raised were presented to the Court under the grant of certiorari in *Travis* v. *United States*, 363 U. S. 801, but the decision (based on improper venue) did not reach them.

It is apparent that the lower court, in restricting the right to *in camera* inspection by the requirement of "particularized need", misapplied the rule of the *Pittsburgh Plate Glass* case. The ruling below is squarely contrary to numerous decisions in the Second and District of Columbia circuits, where *in camera* inspection upon request of the defense is automatic (Second Circuit), or granted whenever the testimony is of great importance (District of Columbia Circuit). See, *e.g.*, *United States* v. *Spangelet*, 258 F. 2d 338 (C. A. 2); *United States* v. *Hernandez*, 282 F. 2d 71 (C. A. 2); *United States* v. *Giampa*, 290 F. 2d 83 (C. A. 2); *Simmons* v. *United States*, 308 F. 2d 324 (C. A. D. C.); *Harrell* v. *United States*, 317 F. 2d 580 (C. A. D. C.).

This conflict in the practice of the federal courts was acknowledged in the opinion below (*infra*, App. A1, p. 12a), and has been remarked by commentators.[13] *In camera* inspection gives full protection to the values of grand jury secrecy, and it seems pointless to require a special showing of need, the bounds of which are difficult to specify and are causing awkward conflicts in federal criminal practice.[14]

---

[13] Calkins and Wiley, *Grand Jury Secrecy under the Illinois Code*, 59 Nw. U. L. Rev. 577, 581, n. 18 (1964). The authors cite additional cases and conclude that the Seventh Circuit follows the practice of the Second Circuit, while the Eighth and Ninth Circuits are in accord with the ruling below.

[14] In addition to the cases cited in the text, *supra*, see *United States* v. *McKeever*, 271 F. 2d 669 (C. A. 2); *United States* v. *Boyance*, 329 F. 2d 372, 376-77 (C. A. 3); *United States* v. *Bertucci*, 333 F. 2d 292, 297 (C. A. 3); *United States* v. *Micele*, 327 F. 2d 222, 226-27 (C. A. 7); *United States* v. *Coduto*, 284 F. 2d 464 (C. A. 7); *United States* v. *Keegan*, 331 F. 2d 257, 263 (C. A. 7); *Berry* v. *United States*, 295 F. 2d 192, 194-95 (C. A. 8); *Brilliant* v. *United States*, 297 F. 2d 385 (C. A. 8); *Hance* v. *United States*, 299 F. 2d 389 (C. A. 8); *Herzog* v. *United States*, 226 F. 2d 561 (C. A. 9), *aff'd en banc*, 235 F. 2d 664; *Bary* v. *United States*, 292 F. 2d 53, 56 (C. A. 10); *Gordan* v. *United States*, 299 F. 2d 117, 313 F. 2d 582 (C. A. D. C.), cert. den'd, 374 U. S. 839.

It is significant to note that the government itself formerly favored the adoption of the Second Circuit rule. See *Pittsburgh Plate Glass*, 360 U. S. at 408-09 (dissenting opinion), and brief for the United States (p. 20) in *United States* v. *Spangelet*, 258 F. 2d 338 (C. A. 2).

The court below has itself been divided on this question in other cases.[15] Inevitably, the requirement of "particularized need" degenerates into a requirement that the defense show inconsistencies in the prosecution witness' testimony. That, however, is the very purpose of requesting the grand jury transcript, and the practical effect is to bar the defense in the very situations where access to the records might be of most value for impeachment purposes. In the present case, even though the court below recognized substantial variances in the testimony (*infra*, App. A1, pp. 5a-6a),[16] the trial judge refused to look at the grand jury transcript, apparently because he feared it would be physically burdensome (R. 107).

---

[15] See *Travis* v. *United States*, 269 F. 2d 928, rev'd on other grounds, 364 U. S. 631, wherein Chief Judge Murrah (author of the opinions below in the present case) dissented from the denial of *in camera* inspection on the ground (269 F. 2d at 946-47) that "there was no conceivable way of showing a particularized need unless the accused could get the grand jury testimony before the court."

[16] Petitioners' showing of "particularized need" was plainly sufficient. Aside from the significant difference in Fikes' first and second trial testimony about a crucial episode on which the court below commented (*infra*, App. A1, pp. 5a-6a) his credibility was further undermined by the showing that he had twice lied under oath about his membership in the Communist Party (R. 532-34, 538-41) and had given untruthful testimony in other proceedings as to his whereabouts in certain years (R. 535-37). Locke's testimony was seriously impeached by his own travel and per diem vouchers (R. 112-18, 125-28).

Gardner and Mason were the other key prosecution witnesses. Gardner was the only witness who gave testimony (R. 551-78) against each of the petitioners and the only one who gave testimony against three of them—Dennis, Dichter, and Sanderson—relating to matters during the period of the conspiracy. Mason's testimony against Travis (R. 29-312, 315-19) was probably the most critical piece of evidence in the case. He also testified against Skinner (R. 312-14) and Wilson (R. 319-20), and, as the case was submitted to the jury, his testimony was usable against all the petitioners. None of the testimony of these witnesses was corroborated.

In the light of the conflicting decisions in the lower federal courts, this Court may also wish to reconsider the conclusion reached in the *Pittsburgh Plate Glass* case.[17] Production of grand jury testimony directly to the defense seems to have been virtually eliminated,[18] despite the majority's statement that it should be allowed on the basis of "particularized need" and the minority's view that it should be allowed as a general proposition, under the principles of the *Jencks* case.

4. *Exclusion of Business and Government Records.* (a) The prosecution witness Locke testified that in the spring of 1948 he was working for Mine-Mill in Detroit (R. 69); that on April 8th he came to Cleveland on the instructions of the Mine-Mill Board member for that area, Kenneth Eckert, to attend a meeting of delegates of the Die Casting Division of Mine-Mill (R. 69-70); that at this meeting Eckert offered a resolution (G. Ex. 1) calling for a change in Mine-Mill policy so that compliance with the Taft-Hartley law might be effectuated (R. 71-2); that on the same or the next day the petitioner Travis came to Cleveland (R. 74) and, at a meeting of Communist mem-

---

[17] Apart from conflict with respect to when *in camera* inspection should be allowed, the inspection process itself is productive of appeals and reversals. In three cases, the Court of Appeals for the Second Circuit found inconsistencies which escaped the trial judge. *United States* v. *Spangelet*, 258 F. 2d 338; *United States* v. *Zborowski*, 271 F. 2d 661; *United States* v. *McKeever*, 271 F. 2d 669. And, in *Gordan* v. *United States*, 313 F. 2d 582 (C. A. D. C.), cert. den'd, 374 U. S. 839, the majority thought the trial judge correct in finding no inconsistencies which might have been useful to the defense, but Chief Judge Bazelon, dissenting, found nine of them (313 F. 2d at 583-85).

[18] We know of only one case since the *Pittsburgh Plate Glass* case in which the court approved production of grand jury testimony directly to the defense. *DeBinder* v. *United States*, 292 F. 2d 737 (C. A. D. C.). But, thereafter, the same court has sanctioned only *in camera* inspection (*supra*, p. 14).

bers on the Mine-Mill staff, declared that "he was going to cut off Eckert's expense account, his salary, his phone bills" (R. 74-5); that later that day Travis, with the petitioners Dennis and Dichter, went to Eckert's office where Travis "told Eckert that he was fired, that his expense account was no longer" (R. 77); that Travis also declared that he was "placing Dichter in charge of the Cleveland office" and that the staff should henceforth report to Dichter and break off all contact with Eckert (R. 77).

Locke further testified (R. 80) that in April, 1948 "right after the meeting in Eckert's office" Eckert moved out and Dichter moved in; that Dichter held staff meetings (R. 80) "nearly every morning for a while"; that Dichter remained in Cleveland for two or three months "or maybe a little longer" (R. 80); and that during this period Dichter was in Cleveland "for the most part", making occasional visits to his home in New York (R. 80).

The thrust of this testimony was that Travis and Dichter were participants in a Communist ouster of Eckert from his union office, and that Dichter as part and consequence of the ouster immediately succeeded to Eckert's functions in Cleveland.

To controvert Locke's testimony concerning Dichter and further discredit Locke's veracity, the defense offered, through Mine-Mill's head bookkeeper, five of Dichter's expense vouchers covering the period in question (R. 772). The prosecution conceded the authenticity of the vouchers (R. 773), but objected to them as incompetent, and the trial court sustained the objection (R. 773).

The defense then made offer of proof (R. 792-93), indicating that the five documents (Def. Exs. Q-1 to Q-5 for Ident., inclusive) were Dichter's travel and expense vouchers for the period April 1 to June 15, 1948. They show that during these two and a half months Dichter

claimed per diem for being in Cleveland from April 7 to 9 and 15 to 17, inclusive, and from May 25 to 27, inclusive, and that at all other times he was in New York, Chicago, or Denver and not in Cleveland (R. 792-93). In other words, during the two months following the April 8th-9th meetings in Cleveland, Dichter was in Cleveland exactly nine days.

The court's rulings were erroneous, for these vouchers and ledgers were clearly admissible under the federal business records statute (28 U. S. C. 1732), which provides in part (*infra*, App. B) that:

> "In any court of the United States . . . any writing or record . . . made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business. . . ."

This Court has said that this statute should be "liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed." *Palmer* v. *Hoffman*, 318 U. S. 109, 115. As "routine reflections of the day-to-day operations of a business" the vouchers amply bore the stamp of "probability of trustworthiness" to which the statute looks. *Smith* v. *Bear*, 237 F. 2d 79 (C. A. 2). In other federal criminal cases, both prosecution and defense have made use of vouchers and similar records to show that a person was or was not at a given place at a given time, and such use has been held proper. *United States* v. *Hall*, 200 F. 2d 957 (C. A. 2); *Pulley* v. *United States*, 253 F. 2d 796 (C. A. 8); *Hines* v. *United States*, 220 F. 2d 381 (C. A. D. C.); *cf. United States* v. *Eisenberg*, 238 F. 2d 143 (C. A. 2).

The court below recognized the error of the trial court in not admitting the vouchers, but concluded that the error "is not fatal to the Government's case" because "the dates

on which Dichter was in Cleveland was not a point on which Locke's testimony was crucial" (*infra*, App. A1, p. 11a). But this is wrong on two counts. Materially, Locke's testimony was designed to show that the Communists in the union were determined to prevent compliance and that for two or three months from early April, Dichter was the instrument of that policy. The importance the prosecution attached to the Locke testimony about Dichter is shown by the extended emphasis given to it in the prosecutor's argument to the jury (R. 918-23).[19] Aside from that, documentary proof that Locke was so wide of the mark about Dichter's presence in Cleveland (holding meetings "nearly every morning") would have seriously impugned Locke's credibility. The exclusion of the vouchers was therefore highly prejudicial to all the accused, and especially Dichter.

(b) To controvert the inference of "parallelism" between Mine-Mill and Communist compliance policies, the defense offered a duly certified list compiled by the National Labor Relations Board, showing when compliance was effected by labor organizations (Def. Ex. for Ident. Y; R. 908-09). From this list—the accuracy and authenticity of which were unchallenged—it is apparent that a great many unions, both affiliated (AFL-CIO) and independent, had not complied until the latter part of 1948, that a number of large unions (including the Brotherhoods of Railroad Signalmen and Railroad Trainmen, the Textile Workers Union, the United Steelworkers, and the Congress of Industrial Organizations itself) complied in 1949 at about

---

[19] For example, after pointing out that Dichter was appointed in Eckert's place, the prosecutor asked the jury, rhetorically, "what does he do?" (R. 920). On the basis of Locke's testimony, he then went on to tell the jury that Dichter "has his staff meetings———day after day———", with "this high functionary of the Communist Party" (Joe Brandt) in attendance (*ibid.*), over a period of two months (R. 921).

the same time that, or shortly after, Mine-Mill complied, and that the United Mine Workers and the International Typographical Union never complied at all. *Cf. Mine Workers* v. *Arkansas Flooring Co.*, 351 U. S. 62. The court sustained the prosecution's objection to the receipt of this document in evidence (R. 909). The issue was presented on appeal, but the court below did not pass on it in its opinion.

The document was plainly admissible under 28 U. S. C. 1733(b), and its exclusion was prejudicial because it would have tended to show that Mine-Mill's policies paralleled those of the trade union movement and to rebut the inference that Mine-Mill policies were controlled by the Communist Party. When the motivation or reasonableness of human action is in question, the behavior of others similarly situated is always relevant. *Twomley* v. *Central Park N. & E. R. R. R.*, 69 N. Y. 158. The principle is so elementary that case authority is scanty. But all reasonably probative testimony is admissible unless it falls within some exclusionary principle, and no such principle was involved here.

5. *"Vicarious Admissions"*. The trial judge charged the jury (R. 1013) that "participation of a defendant in a conspiracy must be determined from evidence relating to the particular defendant's own acts, his own declarations and his own conduct in connection with the actions and conduct of others", and that: "If it is established by the requisite degree of proof that a defendant was a member of a conspiracy, then any act or declaration of another co-conspirator, whether named as a defendant or not, which was made or done in furtherance thereof, would be binding upon all of the members of the conspiracy, even though such declarations or acts were made or done in the ab-

sence of a particular defendant and without previous authorization or subsequent ratification by him."[20]

Although the trial judge thus limited the second instruction quoted above to acts or statements "in furtherance" of the conspiracy, he rejected a defense request (R. 667 and 1030-31) that he specify those declarations and statements which were *not* in furtherance of the conspiracy and therefore could be considered by the jury only against the declarant.

The matter was of great importance to the trial since, as the lower court remarked (*infra*, App. A1, p. 8a), "the government's case here primarily consists of the testimony of eight witnesses who gave evidence of numerous meetings and conferences . . . during the period of the alleged conspiracy at which one or more of the appellants participated."[21] The record (R. 1126-34) discloses no less than 67 items of prosecution testimony (50 during the period of the alleged conspiracy), consisting of a statement made by or in the presence of one or more of the petitioners, each of which was originally received subject to an instruction that it could be considered only against the petitioner(s) directly involved, but subsequently (R. 671-72 and 1012-13) was submitted to the jury under the instructions quoted above.

---

[20] Although similar charges are frequently given in the lower federal courts, the confusing and redundant character of the language is manifest, and has been condemned in the Second and Ninth Circuits. *United States* v. *Dennis*, 183 F. 2d 201 (C. A. 2); *Carbo* v. *United States*, 314 F. 2d 718 (C. A. 9). The charge in the present case was given over objection (R. 666-69), and the error is urged as grounds for this petition, though the errors described in the text are obviously more prejudicial.

[21] However, the court was mistaken in saying that eight witnesses gave testimony relating to the period of the alleged conspiracy. There were eight witnesses altogether, but the testimony of three of them (Locke, Petersen, and Bush) related only to the pre-conspiracy period.

Most of the statements alleged to have been made or heard by individual petitioners during the pendency[22] of the alleged conspiracy were plainly not in furtherance thereof. The witness Moralez, for example, testified to a discussion allegedly participated in by petitioner Skinner, concerning raising money for the relief of one Art Bary, a local Communist functionary who was ill (R. 450-53, 1130 (No. 33)). Indeed, it would be difficult to find as many as a dozen of these "vicarious admissions" which could possibly be deemed in furtherance of the conspiracy.

Nevertheless, the trial judge left it to the jury to determine whether or not particular acts or statements were "in furtherance". In this he was plainly in error.[23] *Baxa* v. *United States*, 381 U. S. 353, decided May 24, 1965. His ruling was likewise contrary to the decision of the Court of Appeals for the Third Circuit in *United States* v. *Guido*, 161 F. 2d 492, 494-95; see also *Fiswick* v. *United States*, 329 U. S. 211, 217; *Logan* v. *United States*, 144 U. S. 263, 309; *International Indemnity Co.* v. *Lehman*, 28 F. 2d 1 (C. C. A. 7), cert. den'd, 278 U. S. 648; Rule 63 of the *Uniform Rules of Evidence* of the National Conference of Commissioners on Uniform State Laws (1953).

Nor did the trial court properly apply the test set forth in the first instruction quoted above, for it allowed the jury to consider as proof that the defendants participated in the conspiracy statements made by persons (local Communist functionaries) not charged as or shown to be

---

[22] Statements made prior to the conspiracy (R. 1126-34, Nos. 1-14 and 35), by definition, are not in furtherance of it. The trial court's charge (*supra*) with respect to pendency was woefully and, we urge, fatally inadequate, since it did not explicitly state that proposition, though earlier the judge had been more precise (R. 672).

[23] The Court of Appeals did not advert to this point in its opinion, although it was briefed and argued.

members of the conspiracy.[24] The judge also allowed the jury to consider (and considered himself, in passing on the motion for acquittal) as evidence that the petitioner Sanderson was a member of the conspiracy, declarations about Sanderson made in his absence (R. 472, 877, and 1099-1100). An instruction (No. 9, R. 1121) which might have mitigated the prejudicial error was refused.

6. *Accomplice Testimony.* The prosecution witness Lawrence was one of those indicted,[25] and two others (Fikes and Gardner) gave testimony which plainly showed them as accomplices. Nevertheless, the trial court refused to charge the jury (No. 5, R. 1120) that accomplice testimony "is to be received with the greatest care and caution", and gave no other instruction with respect to the consideration of such testimony.

The Court of Appeals (*infra*, App. A1, p. 20a) affirmed the trial court's action on the ground the instruction (R. 1022-23) cautioning the jury with respect to the testimony of former Communist Party members and "so-called informers" was sufficient.[26]. But this is unsound both in fact and law. Only one (Fikes) of the witnesses was an "informer". Nor does it make sense that a cautionary instruction, otherwise required, may be omitted because another cautionary, based on a quite different ground, is given.

---

[24] E.g. Brandt (R. 76, 83, and 92); Bary (R. 239-40); Hall (R. 464 and 466-67); Johnson (R. 447); Hillman (R. 449); and Hudson (R. 433).

[25] Lawrence was one of the three accused who pleaded *nolo contendere*.

[26] The court of appeals stated (*infra*, App. A1, p. 19a) that none of the three witnesses was a co-defendant or co-conspirator. With respect to Lawrence, who was named as a defendant in the indictment, the court was mistaken. Fikes and Gardner were not indicted or named in the indictment as co-conspirators, but of course this does not determine that they were not accomplices, and on the government's theory of the case they surely were.

The general practice in the federal courts is to give the substance of the cautionary where, as here, the accomplice testimony is important or uncorroborated, and the decision below is in conflict with cases in three other circuits, wherein the refusal of such an instruction has been held reversible error.[27]

The error was plainly harmful here. For Fikes and Lawrence gave testimony strongly relied on by the prosecution to establish the *factum* of the conspiracy, and Gardner gave the only testimony relating to the period of the conspiracy which touched three of the petitioners (Dennis, Dichter and Sanderson). In this case, therefore, the accomplice testimony was "of crucial importance" and the failure to give the cautionary instruction was prejudicial error. See *Williamson* v. *United States*, 332 F. 2d 123, 132 (C. A. 5).

7. *Admission of Testimony Given at Previous Trial by a Witness Subsequently Deceased.* At the petitioners' first trial, testimony vital to the prosecution's case (302 F. 2d 5, 9-10, and *infra*, App. A2, pp. 25a-26a) was given by William Mason. The witness died prior to the second trial (R. 129-30) and, over the objections of the defense (R. 155-58), the transcript of Mason's testimony at the first trial was read to the jury (R. 280-408) on the authority of *Mattox* v. *United States*, 156 U. S. 237.

The rule of the *Mattox* case rests explicitly on the assumption that the accused has had full opportunity to cross-examine the witness at the earlier trial (156 U. S. at 242-

---

[27] *Second Circuit*: *M'Ginniss* v. *United States*, 256 Fed. 621; *United States* v. *Masino*, 275 F. 2d 129, 133; *United States* v. *Persico*, 305 F. 2d 534, 536-38. *Fifth Circuit*: *Phelps* v. *United States*, 252 F. 2d 49, 53; *Dunn* v. *United States*, 318 F. 2d 89, 93; *Hull* v. *United States*, 324 F. 2d 817, 823-24; *Williamson* v. *United States*, 332 F. 2d 123. *District of Columbia Circuit*: *Freed* v. *United States*, 266 Fed. 1012, 1016; *Bishop* v. *United States*, 243 F. 2d 32, 33.

44). In the present case, petitioners were deprived of that right because of erroneous rulings at the first trial which (a) denied the petitioners access to Mason's grand jury testimony, (b) denied petitioners opportunity to examine Mason on *voir dire* with respect to documents possibly producible under 18 U. S. C. 3500, and (c) prejudicially restricted the scope of Mason's cross-examination.

(a) Mason gave testimony before grand juries prior to the indictments in both the present case and the *Travis* case, *supra* (R. 395-96), and at the conclusion of his courtroom testimony the defense moved for the production of his grand jury testimony, or in the alternative, for its examination *in camera*. The motions were denied (R. 401). We have previously argued (*supra*, pp. 12-16) that the trial court's denial of the grand jury motions was erroneous and in conflict with the practice in other circuits. If petitioners are right in that contention, they were denied full opportunity to cross-examine Mason by utilizing the grand jury transcript to impeach his trial testimony.

(b) At the first trial, although it was known that Mason had been interviewed by government attorneys on numerous occasions, no documents based on such interviews were produced to the court for scrutiny in response to the defense request for statements producible under 18 U. S. C. 3500. The prosecution represented that there were no such producible statements (R. 345-46).

Between the two trials, this Court and the court below ruled that under Section 3500 the government may not itself decide whether or not a statement is producible to the defense, but must produce all witness' statements to the court for scrutiny and ruling. *Campbell* v. *United States*, 365 U. S. 85 and 373 U. S. 487; *Bary* v. *United States*, 292 F. 2d 53. Accordingly, at the second trial, as part of the foundation for offering the record of Mason's testimony, the prosecution delivered a number of documents to the court

based on Mason's interviews with the government attorneys.

The trial court heard examination of six of the attorneys on *voir dire* (R. 161-207) and ruled (R. 215-16) that none of the documents was a "statement" within the definition of Section 3500(e). However, Mason was of course not available for *voir dire* at the second trial, and the review under Section 3500 was therefore fatally incomplete, for it is as essential for the witness to testify as it is for the agent. See the *Campbell* cases, *supra; Hilliard* v. *United States*, 317 F. 2d 150 (C. A. D. C.); *Williams* v. *United States*, 328 F. 2d 178, 181 (C. A. D. C.).

The lower court thought none of this prejudicial because it was ruled that none was producible under Section 3500 (*infra*, App. A1, p. 15a). But the issue of producibility could not be properly ruled on without Mason's *voir dire* testimony, which might have shown that they were in fact producible, as was the result in the second *Campbell* case (373 U. S. at 489-91).[28]

Furthermore, the trial court refused (R. 152-53) to call one of the government attorneys (Foley) who had interviewed Mason, on the ground that he was stationed in Washington, although other attorneys also stationed in Washington were called (R. 172, 183). The court of appeals affirmed this ruling under the mistaken impression[29] that the statement resulting from the Foley interview was made available to the defense (*infra*, App. A1, p. 16a). In fact it was not (R. 208-14), and the refusal to call Foley was especially prejudicial because Mason had testified at the *Travis* retrial that he thought Foley had taken "some notes" in the course of their interview (R. 214), so there

---

[28] The prosecution representation at the first trial that there were no statements to be produced to the court also raises a question of due process. *Brady* v. *Maryland*, 373 U. S. 83, 87.

[29] The trial court had made the same mistake (R. 216).

was a substantial possibility that a producible statement based on the interview was in existence.

Finally, the trial court misapplied the standards of Section 3500(e) in ruling that none of the documents based on the Mason interviews was producible as a "statement". A memorandum by one of the interviewing attorneys (Worthington) based on his notes of the conversation was rejected (R. 215) because it had not been "exhibited" or "read" to or "adopted" by Mason—the test under Section 3500(e)(1)—when the real issue was whether it was "substantially verbatim" under 3500(e)(2). An outline by another government attorney (Crandall) which had been checked over by Mason (R. 172-82) and would seem to have been producible under clause (1) if not (2) as well, was excluded under the "work product" doctrine (R. 182-83)—a ruling inconsistent with the decision of the Court of Appeals for the District of Columbia in *Saunders* v. *United States*, 316 F. 2d 346, 349-50. Reports by FBI agents based on interviews with Mason were excluded without *voir dire* and with no explanatory statement by the trial judge (R. 139).

(c) At the first trial, the defense sought to impeach Mason's general credibility by showing that he, as a naturalized citizen and admitted ex-Communist, feared denaturalization and deportation and was therefore susceptible to pressures or suggestions that he give testimony favorable to the government (R. 373-80). The trial judge sustained objections to this line of cross-examination on the ground that the defense was entitled to show only that Mason had been "paid off some way, either financially or otherwise. . . ." (R. 377).[30]

---

[30] The same issue had arisen when Mason testified in the *Travis* case, *supra*, and the trial court's similar ruling had been approved by the court of appeals. *Travis* v. *United States*, 269 F. 2d 928, 939-40. Accordingly in the present case the issue was foreclosed in the trial court, and the court of appeals did not reconsider the issue, although petitioners preserved the point. The issue was presented in this Court under the grant of certiorari in the *Travis* case (363 U. S. 801), but was not reached in the decision.

The court's ruling was unduly restrictive. The petitioners should have been permitted to show that Mason believed he might be favored or harmed according to the thrust of his testimony, whether or not his belief had a basis in fact. *Alford* v. *United States*, 282 U. S. 687, 691-94; *Farkas* v. *United States*, 2 F. 2d 644, 647 (C. A. 6); *Sandroff* v. *United States*, 158 F. 2d 623, 628-30 (C. A. 6); *Spaeth* v. *United States*, 232 F. 2d 776, 778-79 (C. A. 6).[21]

Furthermore, the evidence otherwise indicated that government agents may have planted the fear of denaturalization in Mason's mind. Although he had been naturalized in 1939, he was interrogated in February, 1952, by an agent of the Immigration and Naturalization Service about his past Party membership (R. 373-75) and the matter was again referred to when he was first interviewed by an FBI agent two months later (R. 146-47). At least by July, 1953, when Mason was still a member of the Executive Board of Mine-Mill, he was supplying information to the FBI (R. 375).

For all the foregoing reasons, petitioners were deprived of full opportunity to cross-examine Mason at the first trial and therefore the admission of the record of his testimony at the second trial was prejudicial and a denial of petitioners' constitutional right of confrontation.

8. *Insufficiency of the Evidence.* As indicated in the statement of the case (*supra*, pp. 5-6), the essence of the charge is that in the summer of 1949, when the executive board of Mine-Mill decided to comply with the Taft-Hartley filing requirements, the petitioners agreed that those of them who were officers should file false affidavits. As evi-

---

[21] A number of comparable state court decisions are summarized in 62 ALR 2d 610 at 639-42 with the generalization, at 639, that: "It is prejudicial error to rule out cross-examination as to expectation of leniency merely because it was not based on any direct or implied promise from the prosecuting authorities, or on any substantial foundation."

dence that such a conspiracy was entered into, the court below relied primarily (*infra*, App. A1, pp. 4a-7a) on statements alleged to have been made at that time by or in the presence of petitioners Travis and Wilson.[23]

With respect to Travis, the lower court found (*infra*, App. A1, p. 7a) crucial significance in his public statement of resignation from the Communist Party (G. Ex. 8, R. 309-12), coupled with Mason's testimony that Travis had told him that the statement had been "cleared with Ben Gold and the Party people in New York" (R. 306). As regards Wilson, the court stressed the testimony of Fikes (R. 429-33) and Lawrence (R. 465-72) concerning a meeting at the Mine-Mill office in Bessemer, Alabama, shortly after Wilson's return from the July, 1949 Board meeting, at which one Hudson (a local Communist Party official) stated in Wilson's presence that the Mine-Mill officers who signed affidavits would write letters of resignation from the Communist Party, but (R. 432) this "would be on paper, only, a piece of paper—and that they would continue to read the Party press, give donations. . . ." The court below, in the footnote to its opinion quoting this statement (*infra*, App. A1, p. 6a, n. 2), erroneously attributes it to Wilson!

Even if this egregious error be disregarded, and it may somehow be assumed that Wilson "adopted" Hudson's statement despite Wilson's own contrary remarks (R. 432, 470-71), all this is still far from sufficient to establish the

---

[23] There is no evidence linking petitioners Dennis, Dichter and Skinner (none of whom was then an officer, though Dennis soon thereafter became one) with the formation of the conspiracy. Sanderson was not then (or later) an officer, but was assistant to the President and attended the July, 1949 executive board meeting at which the decision to comply was made. The only evidence linking Sanderson with the formation of the conspiracy (R. 472) concerned a conversation at which Sanderson was not present.

elements of conspiracy.[33] The fatal lack is evidence of any concert or agreement among the defendants. Even if it be granted that the evidence supports an inference that Travis and Wilson were planning themselves to file false affidavits, there is no evidence that any of the other petitioners were privy to their plans or that they were privy to each other's.

This Court has recently reaffirmed the rule that, under the federal conspiracy statutes, it must be shown that those accused shared knowledge of the unlawful agreement. *Ingram* v. *United States*, 360 U. S. 672. In this case, evidence of mutual knowledge and purpose is wholly lacking.

It may be said that Travis was shown to be conspiring with Ben Gold and others in New York, and Wilson with Hudson and others in Bessemer. If this be assumed, the upshot is two distinct conspiracies with no common members, neither of which is charged in the indictment. Such a profound variance from the indictment charged would unquestionably be fatal to the judgment. *Kotteakos* v. *United States*, 328 U. S. 750; *cf. United States* v. *Agueci*, 310 F. 2d 817, 827-28 (C. A. 2), cert. den'd, 372 U. S. 959; *United States* v. *Borelli*, 336 F. 2d 376 (C. A. 2), cert. den'd, *sub nom. Cinquegrano* v. *United States*, 379 U. S. 960.

Apart from the intrinsic insufficiency of the evidence, the petitioners were seriously prejudiced by the trial judge's instructions to the jury with respect to the standards of

---

[33] Other matters mentioned by the lower court (*infra*, App. A2, pp. 28a-29a) are intrinsically quite innocent ("prolonged association", "common knowledge of the problems presented by the Taft-Hartley Act", and common association with Mine-Mill). Common membership in the Communist Party is plainly insufficient, and can only serve to corroborate. There was no evidence of a "steering committee" at the second trial.

sufficiency and the elements of the offense charged.[34] The defense submitted proposed instructions (Nos. 7 and 11, R. 1120-22) based on the rule affirmed in the *Ingram* case, *supra*, which were intended to call the jury's attention to the necessity of finding mutual knowledge (of the plan to file false affidavits) as a basis for a guilty verdict. The trial judge refused the instructions, and gave none that served this essential purpose.

Finally, the trial judge refused to apply to the charge against Dichter the "isolated transaction" rule applied in the Second Circuit. *United States* v. *Bentvena*, 319 F. 2d 916, 927; *United States* v. *Agueci*, 310 F. 2d 817, 835-36, cert. den'd, 372 U. S. 959; *United States* v. *Aviles*, 274 F. 2d 179, 189-90. There was but one piece of evidence against Dichter relating to the period covered by the conspiracy.[35] The witness Gardner testified to a conversation with Dichter in 1955 (six years after the alleged formation of the conspiracy), the content of which was wholly irrelevant to the charge but which if true indicated that Dichter was at that time a member of the Communist Party (R. 576-78). Both as a matter of general law and under the rule as precisely phrased in the Second Circuit, this single item of testimony was quite insufficient to send Dichter's case to the jury.

---

[34] As indicated above under the first point (*supra*, p. 11, n. 9), the trial judge failed to charge that the jury must find fraud or fraudulent intent, and thus a vital element of the crime which the indictment purports to charge was never found by the jury.

[35] There was also the testimony of Locke relating to Dichter's activities in 1948 (a year before the conspiracy is alleged to have been established), which Dichter sought to controvert by the travel and per diem vouchers erroneously excluded from evidence (*supra*, pp. 16-19), and testimony by another witness regarding Dichter's presence at a Communist meeting in Denver in May, 1948 (R. 235-36).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

TAYLOR, SCOLL, FERENCZ & SIMON,
200 Park Avenue,
New York, N. Y. 10017.

NATHAN WITT,
P. O. Box 156,
New York, N. Y. 10023.

GEORGE J. FRANCIS,
670 Capitol Life Center,
Denver, Colorado 80203.
Attorneys for Petitioners.

TELFORD TAYLOR,
of Counsel.

APPENDIX A

Judgment Below

JUDGMENT

Twenty-First Day, March Term, Monday, April 26th, 1965.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett and Honorable Delmas C. Hill, Circuit Judges.

(Case No. 7621)

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Raymond Dennis, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

(The above judgment was entered in cases Nos. 7622, 7623, 7624, 7625 and 7626.)

APPENDIX A1

Opinion Below (346 F. 2d 10)

Before MURRAH, Chief Judge, and PICKETT and HILL, Circuit Judges.

MURRAH, Chief Judge. Appellants appeal from a judgment of conviction on retrial after reversal of convictions on prior trial. See Dennis v. United States, 302 F. 2d 5.

On the prior appeal we sustained the validity of the indictment and the Court's denial of all pre-trial motions. We reversed the case for admission of hearsay testimony, but sustained the sufficiency of admissible testimony to support the verdict of the jury as to all of the appellants except Durkin and Powers. As to them, we held the evidence insufficient to support conviction.

This appeal perpetuates the attack on the indictment, the constitutionality of 9(h) of the National Labor Relations Act, and the bar of the Statute of Limitations, but these points are not argued. The appellants do sharply challenge the sufficiency of the evidence on retrial to establish a conspiracy to violate § 9(h), but argue if a conspiracy is established, it is at variance with the one charged in the indictment. The contention is that the evidence on retrial is decisively different because some of the witnesses who testified in the former trial did not testify in this trial, and some who did gave materially different testimony. Several trial errors relating to the admission of evidence and instructions to the jury are reassigned in different trial context.

On the sufficiency of the evidence in this appeal to prove the alleged conspiracy the Government adheres to its original theory to the effect that before and after the enactment of § 9(h) the Communist Party was opposed to its non-communist affidavit provisions; that the appellants were at once members of the Communist Party subject to its

discipline and officers or functionaries in the "Mine Mill" Union; that the Communist Party dictated the Union's opposition and consequent refusal to comply with the provisions of § 9(h); that in the Summer of 1949 the Communist Party changed its policy to comply with the provisions of the Act, and the Union, acting through the appellants as its officers, obediently changed its policy to one of compliance; and that pursuant to this changed policy, some of the appellants filed false non-communist affidavits with the knowledge and guilty intent of all.

It does not seem to be disputed that during all or part of the time laid in the indictment, all the appellants were members of the Communist Party and also officers or staff members of "Mine Mill";[1] that the Communist Party and the Union both opposed compliance with § 9(h), and at first the Union refused to comply. That thereafter the Communist Party changed its policy to advocate compliance with the Act, and the Union, acting through the appellant-directors, complied with the Act by filing non-communist affidavits, some of which were false. But, the appellants earnestly contend that this parallelism of policy and identity of membership falls far short of proving a conspiracy among the appellants to defraud the Government by filing false non-communist affidavits to effectuate Union compliance with § 9(h). We are reminded that the

[1] Before and after the commencement of the alleged conspiracy and until 1955, Travis was Secretary-Treasurer of the Union; Wilson was first International Representative, later Executive Board Member, and then Vice President of the Eastern territory. Sanderson was a member of the office staff and most of the time acted as Assistant to the President. VanCamp was Board Member of District 3 and was succeeded by Dennis. Dichter and Skinner were International Representatives. When in 1955 Pezzati succeeded Travis as Secretary-Treasurer, Dichter succeeded him as Board Member from District 6. Dennis was first an International Representative and later succeeded VanCamp as Board Member from District 3.

gist of the offense charged is the unlawful agreement which is not proved by the factum of filing false affidavits by one or more of the appellants. See *United States* v. *Borelli*, 336 F. 2d 376, 384.

The Government pins its case of unlawful agreement on the prolonged association of the appellants as members of the Party and officers of the Union, dedicated to a common cause, *i.e.*, compliance with § 9(h), by the conscious filing of false non-communist affidavits.

In the former appeal we were of the view that quite apart from the excluded testimony, the statements made by appellants Travis and Wilson relative to a change in the Party policy; the record proof that appellants as Party Members subjected themselves to Party discipline; the evidence that a "Steering Committee", "of which some of the appellants were members" transmitted the "Communist Party program, decisions, to the Union * * *" for implementation; appellants' common knowledge of the problems presented by the Taft-Hartley Act; and the common bonds existing between appellants as members of the Communist Party and as officers and employees of "Mine Mill", authorized the jury's findings that the alleged conspiracy laid in the indictment was consummated, *i.e.*, see *Dennis* v. *United States, supra*, page 10.

We then proceeded to analyze the evidence to determine its sufficiency to justify the jury's findings of conscious participation on the part of the individual appellants. In doing so we observed the well known and salutary rule that "mere knowledge, approval, or acquiescence in the object or purpose of a conspiracy does not make one a conspirator". *Id.* p. 12. We thought that while the evidence was unquestionably sufficient to show that Durkin and Powers were active members of the Communist Party, it was insufficient to connect them with the conspiracy. We reversed the case as to them with directions to grant the motion for acquittal.

After reviewing the record in some detail, we thought the evidence sufficiently connected Dichter, Sanderson and VanCamp with the conspiracy to justify the jury's verdict. VanCamp was acquitted on retrial.

Without tediously analyzing the proof relating directly to the appellants Dennis, Skinner, Travis and Wilson, we were of the view that their "individual acts and declarations were forcefully demonstrative of their culpable association in the conspiracy." (Former appeal, p. 10.)

If the evidence was sufficient to convict on the former appeal, the same evidence is, of course sufficient now, and the only question of sufficiency then is whether, as appellants contend, it was materially different and decisively less convincing.

Witness Mason died before retrial, and his testimony (Former appeal, p. 9) concerning appellant Travis was perpetuated under the rule of *Mattox* v. *United States*, 156 U. S. 237; *West* v. *Louisiana*, 195 U. S. 258.

As to appellant Wilson, it is argued that testimony in this trial tending to connect him with the conspiracy is materially different from the former. Specifically, witness Fikes' testimony in the former trial concerning Wilson's incriminatory statements (made at a meeting in Bessemer, Alabama, in the Summer of 1949) to the effect that the letters of resignation from the Communist Party "wouldn't mean anything and would be phoney" was not repeated on retrial. Instead, Fikes and Lawrence (a member of the Communist Party who attended the Bessemer meeting but did not testify in the first trial) testified concerning the meeting that Wilson was opposed to policy change, and they gave no testimony concerning any statement by him that the resignations from the Party would not be genuine. Witness Lawrence is represented as quoting Wilson to the effect that "none of the Executive officers could have any connection with the Party, that is, they could not attend meetings, meet with the Party officials or make contribu-

tions directly to the Party." The testimony of these witnesses was literally different, but the import of the language used was the same. It was susceptible to the inference that Wilson knew of and consented to the change in Party policy and actively participated in the effectuation of it as a Union officer.[2]

---

[2] At the Bessemer meeting in the Summer of 1949, attended by Hudson (a Communist Party functionary), Lawrence, Fikes, Wilson, Hall (a local Party official) and others, Fikes testified that Hudson (who was not a member of the Union) stated, "decision had been made by the Party that officials of the union (Mine Mill) were to comply with the Taft-Hartley law. * * * So he (Wilson) said that they would sign a letter of resignation to the Party, and that they would see that this got into New York—the letter of resignation from the party. But they would continue—that this would be on paper only, a piece of paper—and that they would continue to read the Party press, give donations and it was of utmost—it should be utmost in everybody's mind that the security was the most important thing at this time, because they had to sign this letter of resignation from the Party and was supposed to be out where they could sign the affidavit. * * * he said that he had been to a Board meeting and also met with Party people, and that he was opposed to signing the affidavit on principle, but something had to be done. They had to do something to save the Union. And so therefore he went along with this, that they should resign, write a letter of resignation and should sign the affidavit. * * * Also he spoke of a liaison" between the Party and the Union.

Lawrence testified that at the same meeting "Mr. Wilson reported that the Executive Board had taken action to comply with that provision of the Taft-Hartley Law involving the signing of non-Communist affidavits. He said that all of the Executive Officers—that is, those who, under the law, were to sign the affidavits—had to resign from the Communist Party, that in all except one case this took the form of signing letters which were deposited with local functionaries in each area, in which they resigned from the Communist Party and that in the person of the Secretary-Treasurer (Travis) it was a matter of public resignation.

"He went on to say that from this point on none of the Executive Officers, or none of the Taft-Hartley-ites, as I believe the term can be used, could have any connection with the Communist Party, could

Appendix A1

At the time of the Bessemer meeting in the Summer of 1949, Travis and Wilson were officers of the Union. Travis was Secretary-Treasurer and Wilson was a member of the Board. In accordance with the understanding at the meeting, Travis soon thereafter publicly announced his resignation from the Party in adherence to clearly articulated Party-Union policy. (See Mason's testimony, Former appeal, p. 9).

Appellants suggest that the Government's case against each of the appellants is made up of uncorroborated statements of witnesses concerning incriminating statements by the appellants or by others in their presence, and these statements or admissions are wholly inadequate as a matter of law to prove the offense charged.

Uncorroborated statements or admissions are insufficient to prove guilt. See *Opper* v. *United States*, 348 U. S. 84; *Yarbrough* v. *United States*, 309 F. 2d 936; *Wong Sun* v. *United States*, 371 U. S. 471; Annotation 45 A. L. R. 2d 1317; *Krulewitch* v. *United States*, 336 U. S. 440. But, incriminating statements made by one co-conspirator during the pendency and in furtherance of a conspiracy are admissible as an exception to the hearsay rule once a conspiracy

---

not attend meetings, could not—let me go over that again—that they could not attend meetings, they could not meet with Party officials, and could not make contributions directly to the Communist Party.

"But insofar as Staff members were concerned, there would probably be coordination of their Party activities from that point on primarily within the Union rather than in terms of a series of connections with local Party organizations, but that the details had not yet been worked out.

"But he had indicated that there would be some change in terms of less connection and also in terms of money going into a different area than the local party organizations. This is my best recollection of his report."

has been shown.[3] See *Wong Sun* v. *United States*, *supra*, citing Developments in the Law-Criminal Conspiracy, 72 Harv. L. R. 922, 98[illegible]0; *Fiswick* v. *United States*, 329 U. S. 211; *Krulewitch* v. *United States*, *supra*; *Gay* v. *United States*, 322 F. 2d 208; and *Cleaver* v. *United States*, 238 F. 2d 766; *Briggs* v. *United States*, 176 F. 2d 317.[4] This practice has often been criticized (See Justice Jackson specially concurring in *Krulewitch*, *supra*, p. 445), but has never been rejected. See Developments in the Law—Criminal Conspiracy, *supra*.

True, the Government's case here primarily consists of the testimony of eight witnesses who gave evidence of numerous meetings and conferences at different times and places during the period of the alleged conspiracy at which one or more of the appellants participated. This testimony was admitted in evidence under conventional cautionary instructions to the effect that the statements were not binding on any of the appellants not present when made. These instructions were given repeatedly upon suggestion of defense counsel. At the conclusion of the Government's case, the jury was instructed, "If it now appears from the evidence to your satisfaction beyond a reasonable doubt that a conspiracy existed and that a defendant was one of

---

[3] Mr. Justice Black, speaking for the Court in Krulewitch v. United States, supra, states: "There are many logical and practical reasons that could be advanced against a special evidentiary rule that permits out-of-court statements of one conspirator to be used against another. But however cogent these reasons, it is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements are admissible as exceptions to the hearsay rule. This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts."

[4] Some were admitted to show Party-Union policy prior to the alleged formation of the conspiracy, and they were, we think, competent to lay the foundation for the agreement.

the members, then the acts knowingly done and the statements knowingly made after the formation of such conspiracy by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy."[4]

Compliance with the rule against the admission of hearsay until a conspiracy has been shown by some independent evidence has been observed by according the trial judge wide latitude in the procedural order of proof. See *Briggs v. United States, supra.* The only protection accorded the absent defendant to be charged with the testimony is the conventional cautionary instruction which the trial court freely used in this case. This practice has also been criticized as "unmitigated fiction", See Justice Jackson specially concurring in *Krulewitch* v. *United States, supra,* but it has been traditionally accepted as the only available method of proof for getting at surreptitiously conceived unlawful agreements.[5]

Appellants say that the trial court erroneously departed from his limiting instructions in the general instructions to the jury, but we do not think so. The jury was told they must first determine the existence of the conspiracy charged, and if they entertained a reasonable doubt of the conspiracy as charged, their task was at an end, and they should acquit all defendants. But, if on the other hand, they were convinced beyond a reasonable doubt of the

---

[4] Attorneys for the petitioners respectfully direct this Court's attention to the omission at the end of this quotation in the opinion of the court below, obviously by inadvertence, of the clause: "and in furtherance of an object or purpose of the conspiracy" (R. 672).

[5] See Goldstein, Conspiracy to Defraud the United States, 68 Yale L. J. 405 (1959).

existence of a conspiracy, they should then proceed to consider which, if any, of the appellants were members of it. And, they should determine the participation of any defendant in the conspiracy from the evidence relating to his own acts, declarations and conduct with the actions and conduct of others; that guilt was personal and individual, but once a conspiracy was formed each member became the agent of the other in all things done or said in the promotion or furtherance of the unlawful purpose; however, declarations made not in furtherance of it were not binding on any other members.

The jury was told that mere membership in the Communist Party or affiliation with it or the filing of non-communist affidavits with the National Labor Relations Board was not in itself sufficient to show that any particular defendant was in fact a member of the conspiracy. These instructions clearly and succinctly stated the law of the case and were entirely consistent with the trial court's cautionary instructions.

In the former appeal we approved the procedure by which hearsay statements of alleged co-conspirators may be received as evidence after some evidence aliunde from which the jury could find the existence of a conspiracy and the speaker's complicity in it. See Former appeal, p. 10 and *Briggs v. United States, supra.* Indulging in this concept of trial procedure and order of proof, we were of the view that the evidence taken together was factually sufficient to support the alleged conspiracy. The evidence in this appeal is not materially different.

Appellants complain of the exclusion of business records to prove alibi and discredit prosecution testimony. Specifically, they complain of the refusal of the trial court to admit the expense vouchers of Dichter to show that he was not in Cleveland all the time to which witness Locke testified. (Former appeal, p. 11).

Appendix A1

Locke's expense vouchers were admitted to impeach his testimony to the effect that Travis fired Eckert on April 8, and Dichter took over the office management in Cleveland. Locke's vouchers showed that Eckert continued to approve his expense vouchers until about the middle of May. Later the defense offered Dichter's expense vouchers for the months of April and May, apparently not as a part of cross-examination of Locke, but to impeach his testimony that Dichter took over management of the office for the next "month or two" and that he "had meetings nearly every morning for a while". When the exhibits were offered, Government counsel stated that he understood the purpose of the vouchers was to show "where [Dichter] wasn't at a particular time". Counsel agreed. On this premise the Government objected. The matter was then passed until recess when the offer was renewed "to controvert the testimony of the prosecution witness, Ralph Locke * * * about what was going on in Cleveland beginning around April 8 or 9, 1948."

The Court sustained the objection to the offer of proof without stating any grounds. No point was made of the authenticity of the vouchers or that they were not a part of the business records of the Union within the meaning of 28 U. S. C. 1732. And, the vouchers may well have been admitted into evidence to impeach Locke's testimony concerning specific dates, but the dates on which Dichter was in Cleveland was not a point on which Locke's testimony was crucial. Failure to admit the vouchers is not fatal to the Government's case.

Appellants also complain of the refusal of the Court to lift the lid of secrecy on the grand jury proceedings. The Court's refusal was based upon lack of showing a "particularized need". In the former appeal we sustained the trial court's ruling in view of "the availability of the transcripts of testimony relating to the same subject matter given by many of the Government witnesses before other tribunals and the voluminous statements of such witnesses

produced under 18 U. S. C. A. § 3500". (Former appeal, p. 14).

It is suggested that the availability of other material should not be grounds for denying access to the grand jury proceedings, and we agree. Indeed, it may very well disclose inconsistencies indicating the particularized need. Certainly the trial court ought not decline an "in camera" suggestion in face of the appearance of inconsistencies which might lead to disclosure of further inconsistencies in grand jury proceedings.

Some courts have required judicial inspection of grand jury testimony upon the request of a party against whom a witness has given incriminating testimony. See *U. S.* v. *Hernandez*, 290 F. 2d 86; *U. S.* v. *Giampa*, 290 F. 2d 83. Other courts have required "in camera" inspection whenever it appears "that the testimony of an important prosecution witness at trial may be inconsistent with his testimony before the grand jury." *Simmons* v. *United States*, 308 F. 2d 324; *Harrell* v. *United States*, 317 F. 2d 580. We have been more reluctant to require "in camera" inspection in the absence of some indication of inconsistency. *Travis* v. *United States*, 269 F. 2d 928, 944; *Bary* v. *United States*, 292 F. 2d 53, 56. See also *Berry* v. *United States*, 295 F. 2d 192; *Herzog* v. *United States*, 226 F. 2d 561.[6] But, we have left no doubt of the

---

[6] The federal courts have been roundly criticized for their "paltry interpretation" of the statutory law and federal rules of discovery. Chief Justice Roger Traynor has recently accused federal judges of continuing "to bar discovery upon the rationalization, at odds with the apparent intention of the draftsmen of the rules, that failure to authorize discovery is an implied prohibition of it. * * * the federal courts fail to exercise their inherent power to foster a wholesome integration of discovery procedures into the judicial process." "Ground Lost and Found in Criminal Discovery", Vol. 39, N. Y. L. R., April 1964, pp. 228, 238, 240. See Jones v. Superior Court of Nevada County, 372 P. 2d 919. See also 111 U. Pa. L. R. 1154, 1181-95.

inherent power and the inescapable duty of the trial court to lift the lid of secrecy on grand jury proceedings in aid of the search for truth. The court should not hesitate to inspect and to disclose any inconsistencies if it is likely to aid the fair administration of criminal justice through proper cross-examination and impeachment. In determining variances or inconsistencies we should remember that flat contradictions are not the only test of inconsistency. Omissions of fact or even contrast in emphasis or different order of treatment may be relevant to the process of testing credibility of a witness' trial testimony. See *Clancy* v. *United States*, 365 U. S. 312, 316, quoting *Jencks* v. *United States*, 353 U. S. 657, 667.

Our affirmance is based primarily on the proposition that inasmuch as the witnesses were thoroughly and competently cross-examined on numerous other relevant judicial and extra-judicial statements without manifest inconsistency, it is safe to assume that the grand jury proceedings would not have disclosed anything of impeaching significance. While it would have been safer to have inspected the grand jury testimony, in these peculiar circumstances we remain unwilling to say the trial court committed reversible error by refusing the "in camera" inspection.

Complaint is also made of the Court's interpretation and application of 18 U. S. C. §3500. This evidentiary statute has been authoritatively interpreted to require full disclosure by the Government to the Court of all questionable documents relating to the subject matter of a witness' testimony. But, "Final decision as to production must rest as it does so very often in procedural and evidentiary matters within the good sense and experience of the District Judge * * * subject to limited review of the appellate courts." See *Palermo* v. *United States*, 360 U. S. 343, 353; *Campbell* v. *United States*, 365 U. S. 85, 373 U. S. 487; *Clancy* v. *United States*, 365 U. S. 312;

Bary v. *United States*, 292 F. 2d 53; *Ogden* v. *United States*, 303 F. 2d 724; *United States* v. *Crosby*, 294 F. 2d 928. In determining the issue of producibility the trial court may, and sometimes must, resort to extrinsic evidence bearing not only on the nature of the document but the peculiar circumstances in which it was made. The need for and the extent of extrinsic evidence bearing on producibility must be left to the wise discretion of the trial judge. "This is a problem of the sound and fair administration of a criminal prosecution and its solution must be guided by the need, reflected in so much of our law of evidence, to avoid needless trial of collateral and confusing issues while assuring the utmost fairness to a criminal defendant." See *Palermo* v. *United States*, *supra*, 355; *Saunders* v. *United States*, 316 F. 2d 346. The appellate function on review is to examine the perpetuated withheld document and voir dire inquiry, if any, to determine whether full consideration has been given to the issue and finally whether the trial court's determination is clearly erroneous. See Campbell II, *supra*, 493.

Specifically, appellants say that Mason's testimony was rendered inadmissible because of the lack of voir dire in the first trial. The complaint rests on these facts. Several of Mason's statements were delivered to the defense under § 3500 for use in the first trial. In response to a question from defense counsel the Government prosecutor stated in effect there were no other "statements", and defense counsel accepted Government counsel's word. At the second trial, additional material in the form of interview notes, reports and memoranda were submitted to the Court.

The appellants insist that they were misled by the "ambiguous representations" of Government counsel, and relying thereon did not voir dire Mason to the prejudice of their right to full cross-examination; that Mason's record testimony should, therefore, be excluded in the second trial. For whatever reason, there was no voir dire

of Mason although he was thoroughly and competently cross-examined based upon numerous statements produced pursuant to interviews with Government agents or counsel.

If none of the additional documents submitted at the second trial can be said to be producible § 3500 "statements" for purposes of cross-examination of witness Mason, no prejudice can result from Government's failure to submit them to the Court or lack of Mason voir dire with respect to them. Prejudice, if any, must inhere in the nature of the documents withheld not in the fact of withholding. All investigators or attorneys, except one, who interviewed Mason were called by the Government to testify concerning the nature of the particular interview and resulting interview report or memoranda. Cross-examination of these interviewers failed to indicate that voir dire of Mason on the first trial on the subject matter of the interviews or the nature of the resulting reports would have induced production of any of the submitted documents.

The trial court made specific findings with respect to each of the Mason interviews. In each instance it found that the report, trial memorandum or outline, as the case may be, was made from the memory of the interviewer, from notes made at the time of the interview but destroyed in good faith after dictation of the report or memorandum, or that the trial outline or memorandum had been composed from several sources of information including records of other trials involving some of the same witnesses and defendants. The Court specifically found that none of the documents in question was ever submitted to Mason for signature or approval. With particular reference to the Crandall "outline" the Court found that it had been prepared from a transcript of Mason's testimony at the first Travis trial in which present defense counsel had participated. Addressing defense counsel during argument on the matter the Court stated, "So this outline was

prepared in testimony that was elicited in open court in your presence in which you participated and it was in no sense a statement under 18-3500." The trial court's careful findings with respect to the documents resulting from Mason interviews are not clearly erroneous, and its ruling thereon must be sustained.

The only Mason interviewer (Foley) not produced for voir dire interviewed him in 1954 apparently regarding a National Labor Relations Board matter. This interview resulted in an affidavit by Mason which was made available to defense counsel in the former trial and redelivered in the present trial. From interrogation of Government counsel the Court was satisfied the affidavit was the only document relating to the interview of Mason by Foley. In these circumstances the trial court's refusal to recall the interviewing attorney from Washington for voir dire was not error. We conclude that Mason's testimony was not improperly perpetuated.

All of the other documents relating to the subject matter of the testimony of all other witnesses delivered to the Court for determination of producibility under § 3500 were carefully considered by the Court pursuant to the extensive voir dire examination of both the witnesses and with two exceptions (to be noted) the interviewing Government agents. With respect to each identified document or group of documents the responsible interviewing agent testified that he prepared the report, memorandum or outline either from memory or from fragmentary notes, including "key words and phrases", or that the memorandum or outline was composed from information obtained from the testimony of witnesses in other similar trials and in no instance were any of the documents submitted to or in any way adopted by the related witness. Some of the interviewers who took notes of the interview testified that the notes were destroyed in good faith after dictation of a memorandum. Each witness also testified that although in some

instances the interviewer took notes, they were never submitted for signature or approval nor was he in any way called upon to adopt the notes or any other document made pursuant to the interview.

One interviewer testified by affidavit (admitted into the record without objection) that he prepared a memorandum of his interview with witness Gardner from fragmentary and abbreviated notes of the matters discussed, but they in no sense purported to be verbatim remarks of Gardner nor were they ever read to him nor was he called upon to approve or affirm them. The notes were appended to the affidavit for the record.

Appellants complain of the failure of the trial court to require the attendance of one interviewing attorney for purposes of voir dire. This Government attorney for the Immigration and Naturalization Service interviewed witness Fikes apparently concerning some matter relating to a deportation hearing. When defense counsel suggested the Court require the interviewing attorney be produced for voir dire, the Court inquired of witness Fikes whether he had made any written statement of any kind to this interviewer. Fikes answered he had not and moreover no questions were asked concerning any of the appellants in this case. There was no further cross-examination of any kind and the trial court rightly declined to produce the witness.

Based upon voir dire testimony of all responsible interviewers and related witnesses and an examination of each document or group of documents, the trial court concluded that none of the withheld documents was a statement within the definition of § 3500. His conclusions were based upon specific findings to the effect that none of them was ever signed or otherwise adopted or approved by the witness nor was it a "verbatim recording" of the interview of the witness. Appellants do not now contend that any of the documents were signed or otherwise adopted or approved

by the witness within the definition of § 3500(e)(1). The contention is to the effect that the trial court simply stopped there and did not proceed to determine whether the documents or any of them were producible under § 3500(e)(2) as "other recording * * * which is substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement".

We do not think that failure of the trial court to couch its findings in the verbatim language of the statute is any indication of its failure to consider the producibility of the documents as "verbatim recitals" of the oral statements of the witnesses. Appellants were undoubtedly contending for production under either subsection of § 3500, and the trial court's inspection and ruling on each document was undoubtedly based upon producibility under either subsection of the statute. In any event we have examined all of the excluded material certified here under seal for the purpose of determining producibility of any of the documents as contemporaneous "verbatim recitals" of oral statements of witnesses.

Our independent examination shows that the trial court did produce a number of statements without excision. Much excised material was produced. The documents and excisions which were withheld related in the main to members of the Communist Party, many of whom are unrelated and unidentified with this case. Others related to activities of the appellants wholly unrelated to these charges. The withheld documents were couched in the vernacular of "Informant stated", "Informant advised" or "Informant related", but none we have examined can be said to be a verbatim recital within the meaning of § 3500(e)(2). We think they were properly withheld.

During the course of the trial, the defense moved to strike the testimony of witnesses Lawrence, Fikes, Locke and Gardner in consequence of the destruction of the inter-

view notes after preparation of memoranda based thereon. These motions were inspired by footnote 5 of Campbell II, *supra*, p. 491, where the Court posed but did not answer the issue whether "If the notes were producible under the Act, their destruction gives rise to sanctions under subsection (d) or permits secondary evidence of their contents to be produced". We have no occasion to decide this issue since the question itself presupposes producibility of that which was destroyed. Certainly we should not order the production of an otherwise non-producible document on the chance its non-existent progenitor might have been producible.[7] While the notes are not available for inspection to determine producibility, examination of the memoranda which are based on the notes affords no basis for surmising that the antecedent notes were verbatim recitals of oral statements of the witnesses. On the contrary they indicate quite clearly to us that the notes were not producible so as to give rise to the question of sanctions under subsection (d). In these circumstances we think the trial court properly denied the motions to strike.

Finally, appellants complain of the refusal of the trial court to give their requested cautionary instruction on "accomplice testimony". The request is based upon the assumption that the witnesses Fikes, Lawrence, and Gardner, although not co-defendants or co-conspirators, were within the definition of an "accomplice" because they were in "some way concerned or associated in the commission of the crime". See *McLendon* v. *United States*, 19 F. 2d 465, 466; *Johns* v. *United States*, 227 F. 2d 374; *Cleaver* v. *United States*, 238 F. 2d 766.

It may be conceded *arguendo* that these witnesses came within the category of an accomplice by virtue of their

---

[7] It is admitted that the notes were destroyed in good faith in accordance with established practice of the FBI.

membership in or affiliation with the Communist Party and their association with the appellants. Even so, we think the trial court's careful instructions on the weight to be given the testimony of former members of the Communist Party and "so-called informers" was entirely sufficient to caution the jury concerning the treatment to be accorded the testimony of these particular witnesses.[8]

Judgment is AFFIRMED.

---

[8] The Court instructed the jury, "In weighing the testimony given by former members of the Communist Party, you should consider whether the circumstances of their membership or their leaving the Party might have given rise to some hostility or prejudice against the Communist Party or against these defendants which might affect the accuracy or truthfulness of their testimony.

"The evidence shows that certain of the Government's witnesses were in times past engaged by the Government as confidential informants to join the Communist Party and make reports to the Federal Bureau of Investigation of such facts as they learned during such association, and they were paid considerable sums of money for their long service while so engaged for procuring evidence, including among other things with respect to the activities of the defendants. In weighing the testimony of such witnesses you should scrutinize their testimony with greater care and caution than if they were not so engaged. In this connection, it should be borne in mind it is sometimes necessary in proving the commission of certain crimes for the Government to rely upon evidence furnished by these so-called informers. All of the factors which might act as an inducement to a witness to deviate from the truth or to color testimony should be considered by you. However, you should not infer that the existence of any of these factors or any one of them in relation to some of the witnesses is of itself sufficient to discredit such witness' testimony. A witness who is a former member of the Communist Party or an informer or who by reason of interest, hostility, bias or hope of reward might be induced to give false testimony may nevertheless testify accurately and truthfully. If you find that such witness has testified truthfully, then such testimony is as good as the truth testified from any other source. What the fact is in this regard as to all the witnesses for both the Government and the defendants is for you to determine in the light of all the circumstances and in accordance with your experience and best judgment."

APPENDIX A2

Opinion Below, Reversing Petitioners' First Conviction (*Dennis et al. v. United States*, 302 F. 2d 5)

Before MURRAH, Chief Judge, and PICKETT and HILL, Circuit Judges.

MURRAH, Chief Judge. These appeals are from judgments convicting the nine appellants of conspiracy to defraud the United States (18 U. S. C. A. 371). The indictment charges, in essence, that appellants, together with five other defendants not involved in this appeal, and others unknown to the Grand Jury, conspired to fraudulently effectuate, on behalf of International Union of Mine, Mill and Smelter Workers, a compliance with Section 9(h) of the Labor Management Relations Act of 1947 (sometimes hereinafter referred to as the Taft-Hartley Act)[1] by means of filing false non-Communist affidavits and to thereby obtain and use the facilities and services of the National Labor Relations Board (sometimes hereinafter referred to as N.L.R.B., or Board).

Appellants were all officers or employees of the International Union of Mine, Mill and Smelter Workers (sometimes hereinafter referred to as Mine-Mill, or Union) within the period beginning in 1949 and ending in 1956, during which the alleged conspiracy existed.

It is here urged that the indictment does not state an offense; that motions for the production of grand jury testimony and statements under Section 3500, Title 18 U. S. C. A. and motions for severance, change of venue, continuance and for a new trial were improperly denied; that the evidence is insufficient to support the judgments as to any of appellants; that the trial court erred in the admission and exclusion of evidence; and that the summation by the prosecution and the court's charge to the jury

[1] The court summarized Section 9(h).

were prejudicially erroneous. Appellants also preserve issues concerning the constitutionality of the general conspiracy statute (18 U. S. C. A. 371), the non-Communist clause of the National Labor Relations Act of 1947 (29 U. S. C. A. 159 (h)), and Section 3500, solely for further review in the Supreme Court.

In a comprehensive opinion, the trial court analyzed and sustained the sufficiency of the indictment here under attack. United States v. Pezzati, 160 F. Supp. 787. We are in full agreement with the reasoning and conclusion contained in that opinion and, for the reasons there stated, hold that the indictment charged an offense against the United States.

Appellant-Travis moved for severance, continuance, and change of venue on the ground that his recent convictions in the same court for the substantive offense of filing false non-Communist affidavits, with extensive attendant publicity, precluded a fair trial. The remaining appellants each moved for severance on the ground that they suffered prejudice by being jointly tried with Travis. Appellants acknowledge, of course, that such relief is largely within the discretion of the trial court, and that its ruling will not be disturbed in the absence of clear abuse. And see Opper v. United States, 348 U. S. 84.

These motions bring into focus the basic right to a fair and impartial trial, and we proceed on the premise that this right transcends any right to prejudicially publicize or sensationalize its collateral aspects. And, it is no answer to say that an unfair trial is the only one obtainable under the circumstances. See Marshal v. United States, 360 U. S. 310; Irvin v. Doud, 366 U. S. 717. But the mere fact of unfavorable publicity does not of itself raise a presumption of prejudice. See Blumfield v. United States (8 CA) 284 F. 2d 46, cert. den. 365 U. S. 812. The prejudice must have manifested itself so as to corrupt due process.

Appendix A2

In ruling on Travis' pre-trial motions for severance and continuance on the grounds of prejudicial publicity, the trial court indicated that the proper remedy was change of venue, and invited such motion. The record indicates that such motion did not come until after the jury was empanelled and the question of jeopardy was apparent. Moreover, there was no showing that the unfavorable publicity so saturated the community-mind as to render a fair trial unlikely. Indeed, the record affirmatively shows that only four members of the jury had ever heard of Travis and there was no showing that these four were in any way prejudiced by their knowledge of him.

The motions of the remaining appellants, in addition to the publicity touching Travis' previous trials, also alleged that their joint trial would be prejudicial because certain admissions and other evidence concerning Travis would come before the jury. But, by reason of the very nature of a conspiracy case and the overwhelming evidence as to Travis' status as one of the conspirators, the evidence as to his admissions and activities would have come before the jury regardless of his physical presence. In these circumstances, we do not think the trial court erroneously refused these motions.

The sufficiency of the evidence: without minutely detailing the proof presented by the government, it is sufficient to note that while conflicting, the evidence was such that the jury could, and obviously did, find that appellants, prior to the filing of the affidavits in question,[2] were members of or affiliated with the Communist Party; that such membership or affiliation continued after the filing of the affidavits; and that at least some of the affidavits thus filed were false. Equally sufficient is the proof that the

[2] There were thirty-eight (38) non-Communist affidavits filed by the six appellants who were officers of Mine-Mill during the critical period.

purpose of filing the affidavits was to obtain the services and facilities of the N.L.R.B. and that Mine-Mill did, by means of such affidavits, secure and use those facilities.

Appellants are not, however, charged with the substantive offense of filing false affidavits. They are charged with conspiracy to defraud the United States and the conspiracy, or unlawful agreement, is the gist of the offense. Braverman v. United States, 317 U. S. 49, 54; Carlson v. United States (10 C. A.) 249 F. 2d 85.

Appellants contend that the evidence is totally lacking with respect to proof that any of them agreed or conspired together, or with any other persons, to accomplish the fraud. As proof of a conspiratorial agreement encompassing all of the appellants, the government undertook to show that aside from their respective positions in Mine-Mill, the accused, as members of the Communist Party, concertedly acted in accordance with a contemporaneous Communist Party policy of having its members occupying official Union positions file false affidavits in order to avail their Union of the services of the N.L.R.B.

The government's proof satisfactorily established that in 1947, upon passage of the Taft-Hartley Act, Mine-Mill adopted a policy of noncompliance which continued until July 1949, when its International Executive Board unanimously voted to comply.[8] It was further shown that Mine-Mill's policy of noncompliance, extending through 1948 and into 1949, was the same as that of the Communist Party. And, the government introduced four pieces of evidence intended to prove, inter alia, that Mine-Mill's change of policy was the implementation of a like Communist Party policy change:

1. Witness Loutner testified that in 1949 he was a Party functionary, a member of the National Review Commission,

[8] The Executive Board was, apparently, comprised of ten members, including appellants Van Camp, Powers, Travis and Wilson.

head of the New York State Review or Disciplinary Commission, and member of the New York Organizational Commission of the Communist Party and that in June of that year, he attended a meeting of the Organizational Committee in New York where one Sid Stein, whom he identified as an Assistant Secretary of the Party Labor Commission, discussed Party policy and its application relative to compliance or noncompliance with the Taft-Hartley Act. Specifically, Loutner testified that Stein said: "(T)hat our (the Party) position in the light of the situation at that particular moment must be a principle position * * * based on a consideration that we must not resign leadership in * * * the trade union movement and * * * that kind of principle understanding necessitates a change in our technical approach in relation to the Taft-Hartley noncompliance law * * * that the Party in that particular recent period suffered a lot of losses because of various raids, and that it was then the considered judgment of the Party that for the sake of carrying out a principle position there would have to be compliance with the Taft-Hartley law, as far as non-Communist affidavits are concerned * * * that there will be Party leaders in the labor movement * * * who will resign publicly. They will state in their public resignation that that resignation does not necessarily mean that they broke with the ideology or the principles of the Communist Party, but that this resignation is forced upon them in order to maintain and stay with their membership and give leadership and guidance to them. * * * Ways and means will be found to maintain contact and liaison with the Party leadership. * * *

2. Witness Mason testified that he was a member of the Board of Mine-Mill in 1941-1942 and from 1945 to 1953, inclusive, and that in the summer of 1949, at least a month before the July meeting of the Executive Board of Mine-Mill, he had a conversation with appellant-Travis in which "Travis said that quite a number of people out in the field

were in favor of the Union changing its position on the Taft-Hartley law, that difficulties of organizing and retaining * * * our membership as a union that is not complying with the Taft-Hartley law and therefore unable to use the machinery provided by the National Labor Relations Board, these difficulties were increasing and that there was discussion going on within the Party concerning the change in this position and (speaking to Mason) 'You'll be happy to learn that the boys in the Party are considering changing our position on this and you'll be hearing about it pretty soon'." Mason further testified that about a week after the meeting of the Executive Board in which the decision to comply was made, he asked Travis how that decision would affect Travis' position as Secretary-Treasurer of the Union and that Travis replied that he would not have to resign as Secretary-Treasurer " * * * but that he will now have to resign from the Party." Mason stated that Travis showed him a written statement of resignation from the Party and told him that it was "cleared with Ben Gold and the Party people in New York * * *."

3. Witness Fikes testified that he was a member of the Communist Party in 1949, and that during the summer of that year he attended a meeting at which appellant-Wilson said " * * * he had just attended a meeting at the national office and also a party meeting, and that the decision had been made to comply" and that "the officers would fill out the letter of resignation to the party, but that it wouldn't mean anything, that it would be a phoney letter and that it, in his opinion, was a correct decision."

4. Witness Gardner testified that in 1951, when he was a Communist Party member working in the office of appellant-Dennis in Cleveland, Ohio, that he had access to the files of that office and that he found therein the letter of resignation from the Communist Party filed by Dennis and

that "I asked him whether he thought it was advisable to leave such a letter as that in the Union files and he assured me that he could see nothing wrong with it because we certainly understood that these letters were sent out, by all of the Party leaders at the time of the signing of the Taft-Hartley affidavits and that there was nothing wrong with it being there, it was simply a record to avoid prosecution under the Taft-Hartley Act * * *."

Appellants vigorously attack the competency of Loutner's testimony, which, unlike the testimony of Mason, Fikes and Gardner,[4] was introduced against appellants collectively. Loutner was not named in the indictment as an alleged co-conspirator, nor was he shown to have had any connection with such conspiracy. The statements which he attributed to Stein were not made in the presence of any of the appellants and, having been introduced to prove the fact of a Party policy change (i.e. proof of the matter asserted) they were clearly hearsay. And, unless they came within some exception to the hearsay rule, they were inadmissible. Hopt v. Utah, 110 U. S. 574; Donnelly v. United States, 228 U. S. 243, 273; Baltimore American Ins. Co. v. Pecos Mercantile Co. (10 CA), 122 F. 2d 145, 146; Flintkote Co. v. Lysfjord (9 CA), 246 F. 2d 368, 385, cert. den. 355 U. S. 835.

At trial, the government took the position that Stein's statements were admissible as those of a co-conspirator. However, before the statements of an alleged co-conspirator may be received in evidence as an exception to the hearsay rule, it is necessary that there be some competent proof, aliunde, from which the jury could conclude that the speaker was a member of the conspiracy. Glasser v. United States, 315 U. S. 60, 74; Clune v. United States, 159 U. S. 590, 593;

---

[4] The conversations testified to by Mason, Fikes and Gardner were admitted into evidence under the court's cautionary instruction for the jury to consider them only as against the declarants.

Panci v. United States (5 CA), 256 F. 2d 920; Kamanosuke Yuge v. United States (9 CA), 127 F. 2d 683, 689. We find no such evidence. The sole testimony relative to Stein is that given by Loutner.

The government contends, however, that there was evidence from which the jury could infer that appellants Travis and Wilson knew who Stein was and that it was therefore permissible for the jury to conclude that Stein was a member of the conspiracy. But even assuming that such was the proof, it fell far short of connecting Stein to the alleged conspiracy—a prerequisite to the competency of his statements. Clearly, the admission of Loutner's testimony as to what Stein said was improper. And though some error in the admission of testimony is almost inevitable in a lenghty trial such as this, we cannot overlook the devastating effect of Stein's statements which blueprinted for the jury the formation of the alleged conspiracy and the means by which it was to be carried out and which were emphasized by the government in both its opening and closing arguments. The admission of this testimony was undoubtedly prejudicial error and requires reversal.

But even in the absence of Loutner's testimony, the statements made by appellants Travis and Wilson relative to a change in Party policy; the record proof that appellants, as Party members, subjected themselves to Party discipline; the evidence that a "Steering Committee", of which some of the appellants were members, transmitted "the Communist Party program, decisions, to the Union • • •" for implementation; appellants' common knowledge of the problems presented by the Taft-Hartley Act; and the common bonds existing between appellants as members of the Communist Party and as officers and employees of Mine-Mill—furnish competent evidence which, viewed in the light most favorable to the government, authorized the jury's finding that the filing of the false affidavits was the agreed means of perpetuating Communist influence in Mine-

Mill, and not a series of unrelated and coincidental acts. Indeed, a conspiratorial agreement is seldom susceptible of direct proof. And, ordinarily, as here, the unlawful agreement can only be established by the acts and conduct of the conspirators and the inferences to be drawn therefrom. Jones v. United States (10 CA), 351 F. 2d 288, and cases there cited.

Viewed in the light of this evidence, the dismissal of the indictment is inappropriate. And, we thus turn to an examination of the proof allegedly connecting each appellant with the conspiracy. Specifically, appellants Dichter, Durkin, Powers, Sanderson and Van Camp contend that the evidence is lacking in this regard.

Irving Dichter:

Dichter attended a Union Wage Policy Conference in Denver, Colorado in 1948 where he supported the noncompliance policy. Also in 1948, as an International Representative of Mine-Mill, Dichter attended a meeting of the Die Casting Council in Cleveland, Ohio at which Kenneth Eckert (International Executive Board Member representing the Die Casting Division of Mine-Mill) proposed a resolution to change the Union policy from one of noncompliance to compliance. Dichter had learned of the resolution earlier that day and had told Eckert that it "was a sneaky thing to do, that he (Eckert) should have presented the resolution to the staff * * * rather than handed it to the staff a few minutes before the meeting was to take place, and that he (Dichter) was going to call Travis and get him into Cleveland right away." Appellant Travis arrived in Cleveland the next day and a Communist Party meeting was held. Present at this meeting were Joe Brandt (identified as Labor Secretary of the Communist Party), appellants Travis, Dichter, Dennis and other persons. Brandt stated "that the Union should suspend Eckert from office, cut off

his expense accounts and do everything possible to restrict him financially so that he couldn't go out and contact other locals in the surrounding area and * * * Eckert would be publicly expelled from the Communist Party and * * * that as of that time on, we (Party members) were to observe Party discipline and not have any social contacts or discussions with Eckert." Appellant-Travis then stated that he "was going to suspend Eckert from office and he was going to place Irving Dichter in charge of the Cleveland office * * *." Thereafter Dichter took over the Cleveland office and held staff meetings which, at his invitation, Joe Brandt attended. Dichter appeared at an N.L.R.B. election in 1953, and in 1955, upon becoming a Board member of Mine-Mill, he filed a non-Communist affidavit. Shortly thereafter, Dichter conducted an investigation for the Communist Party in order to determine the activities of one of the Party members suspected of leading an anti-Travis movement within the Union. During this investigation, Dichter stated and emphasized that "Mine-Mill was the last stronghold of the Party in the great union movement" and expressed "the importance of holding onto that * * *." In 1956, Dichter filed two more affidavits.

We think this evidence sufficient, in light of the general scheme established by the government's proof, to connect Dichter to the conspiracy.

James Durkin:

Durkin attended a Communist Party meeting in Denver, Colorado in 1948, at which it was decided that Communist officials of the Union would not sign the non-Communist affidavits. In 1952, Durkin, a former President of Office Workers International Union, became an International Representative of Mine-Mill. The next year, upon being asked how his affiliation with Mine-Mill had come about, he stated "that after the Office Workers Union had folded up in New York * * * he was then available for an assignment

and that the Communist Party in New York had suggested that he could strengthen the leadership of the Party in the trade union movement in the Chicago area, and that they had an opening there in Mine-Mill for him." In 1955, Durkin contacted Fred Gardner, who was the subject of the anti-Travis movement being investigated by appellant-Dichter, and told him that "the Party was interested in getting (Gardner's) position * * * and for that reason they were holding a meeting * * * and wanted (Gardner) to be sure and be there * * * to explain (his) position again officially for the Party." Durkin attended the meeting.

This evidence, while unquestionably sufficient to show that Durkin was a member of the Communist Party, had no bearing upon the conspiracy to fraudulently obtain the services of the N.L.R.B. The "anti-Travis" movement was a result of Travis' handling of a strike settlement and had no relationship to the filing of false non-Communist affidavits. And even though this evidence was sufficient to support the inference that Durkin had knowledge of the conspiracy, it did not tend to prove that he had in any way become a part thereof. Indeed, he did not file any affidavits and, with the sole exception of attending an N.L.R.B. election in 1953, he performed no acts which might reasonably be said to have been in furtherance of a conspiracy.

Mere knowledge, approval or acquiescence in the object or purpose of a conspiracy does not make one a conspirator. *Cleaver* v. *United States*, (10 CA) 238 F. 2d 766. Accordingly, we hold the evidence to be wholly insufficient to support the conviction of Durkin.

Chase Powers:

In 1948, Powers was a member of the "Steering Committee" which implemented Communist Party policy within the Union. As an International Executive Board Member, he attended the 1948 meeting of that Board and advocated

the policy of noncompliance. And, in 1949, he was a member of the Board which changed Mine-Mill's policy to one of compliance.

Powers' position on the "Steering Committee" was evidence of his membership in the Communist Party in 1948, but we find no evidence that such membership continued into the period extending from June 1949 to November 1956, during which the conspiracy existed and, a fortiori, no evidence that any of the ten affidavits filed by him during such period were false. The government contends that statements made by Powers during 1953 indicate that he had knowledge that the Communist Party still had influence in the Union. But even so, there was no evidence that he knew that any of the officers of the Union were Communists during the time they were required to file affidavits or that he had any knowledge of any conspiracy to have such officers falsify such affidavits. Without knowledge, the intent to participate in an established conspiracy cannot exist, and " * * * to establish the intent, the evidence of knowledge must be clear, not equivocal." Ingram v. United States, 360 U. S. 672, 680. For these reasons, Powers' motion for acquittal should have been granted.

Harold Sanderson:

Sanderson was present at the meeting of the "Steering Committee" in 1949 when the 1948 decision of noncompliance on the part of the Communist Party was disclosed. After the International Executive Board of Mine-Mill had decided to change the policy of the Union, Sanderson was named to handle the questions raised by local unions about the filing of the affidavits. In 1953, Sanderson had a conversation with Fred Gardner in which he stated " * * * that there was a very dangerous factional situation within the Party in the Coeur d'Alene (Idaho) area and within the members of the Mine, Mill Smelter Workers, particu-

larly." That "this factionalism was the result of the resignation of a former International Staff member * * * that I (Gardner) was to be careful on the manner in which I worked in there, to try to remain aloof from these factions until such time as * * * the leadership of the Party * * * felt that it was advisable for me to meet with the Party * * *." And at a Party meeting in 1955, attended by appellants Travis, Durkin and Sanderson, it was Sanderson who requested Gardner to state his anti-Travis position for the Party. Additionally, Sanderson notarized the affidavits filed by appellants Travis, Dennis and Powers in 1954.

The evidence is strong that Sanderson was a member of the Communist Party during the conspiratorial period, and the inference that Sanderson, as a member of the "Steering Committee", knew the identity of the others of Mine-Mill's higher echelon who were Party members is entirely reasonable. Certainly his Party associations with Travis, Gardner and Durkin during the critical period support this conclusion. And, his activities in furnishing liaison to the local unions on the problems arising out of the decision to comply with Taft-Hartley and in subsequently notarizing some of the false affidavits are sufficient, in our view, to support the jury's finding that Sanderson was a conspirator.

Jesse Van Camp:

Van Camp attended a Communist Party meeting in East St. Louis, Missouri in 1948, at which appellant Dennis reported on his recruiting of new Party members. At Mine-Mill's 1949 convention, subsequent to the International Board's decision to comply with Taft-Hartley, and after having filed an affidavit himself, Van Camp told Gardner that "at a Communist Party meeting he agreed to step aside as Board member * * * to permit Raymond Dennis to become the Board member, and at that time he

expected to become the Regional Director" of his area. Additionally, Van Camp assisted in N.L.R.B. election campaigns in 1950 and 1952.

This evidence was adequate to establish Van Camp's membership in the Communist Party and the falsity of the affidavit which he filed. And, his nomination of a known Communist to succeed him in a position which he knew, under these circumstances, would require the filing of a false affidavit, supports the jury's finding that he was a knowledgeable participant in the conspiracy.

Without tediously arraigning the proof relating directly to appellants Dennis, Skinner, Travis and Wilson, it is enough to say that their individual acts and declarations were forcefully demonstrative of their culpable association in the conspiracy.

Since, as we have noted, the prejudicial quality of the Loutner testimony requires reversal, it is necessary to treat only those of the remaining allegations of error arising from situations which, upon retrial, are likely to recur. In our view, these situations are confined to the trial court's denial of appellants' motions for the production of grand jury testimony for use on cross-examination and the correctness of certain instructions relating to issues necessarily inherent in the case.

Appellants contend that the trial court's denial of their motions for "in camera" examination of the testimony of various witnesses given before the grand jury was erroneously based upon appellants' failure to disclose inconsistencies. Of course it is now well settled that the traditional secrecy of the proceedings before a grand jury will be broken only upon a showing of a "particularized need." See *United States* v. *Procter & Gamble*, 356 U. S. 677; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395. And, we have recently held that the necessity of demonstrating a "particularized need" extends equally to requests for examinations "in camera." *Bary* v. *United States* (10 CA)

292 F. 2d 53. In our case, appellants moved for the production of grand jury proceedings at the conclusion of the testimony given by the government's first witness. The trial court stated: "The court doesn't feel that the defendant has shown either a particularized need, as the word is used in the *Pittsburgh Glass* case, or any reason, as a matter of fact, valid or otherwise, why the court should inspect them to determine whether or not there are inconsistencies." The trial court's subsequent rulings on like motions were entirely consistent with the appropriate test of "particularized need" and in view of the availability of the transcripts of testimony relating to the same subject matter given by many of the government witnesses before other tribunals and the voluminous statements of such witnesses produced under 18 U. S. C. A. 3500, we do not think the trial court abused its discretion in refusing to undertake an "in camera" examination of the grand jury proceedings for the purpose of ferreting out possible inconsistencies.

It is additionally contended that the trial court erroneously refused to instruct the jury as to the significance of membership or affiliation prior to the signing of the non-Communist affidavits, or to instruct that a member could resign from the Party and lawfully sign the affidavit; that the trial court failed to give an instruction explanatory of the bearing which the evidence was to have as to each of the thirty-eight affidavits filed by appellants throughout the conspiratorial period; and that the trial court's instructions adopted the wrong limitational period.

At several places in the charge to the jury the trial court quoted the form of the affidavit required by the Taft-Hartley Act. That form states: "I am not a member of the Communist Party or affiliated with such Party * * *." The form of the affidavit, which speaks only in the present tense, together with the jury's knowledge that like affidavits were required to be periodically filed by the same person, made it abundantly clear that its falsity depended upon the affiants'

membership or affiliation at the time of filing. And though a specific instruction on the point would have served to eliminate any possible doubt, we cannot say, in view of the entire charge, that the jury was not satisfactorily informed.

As to the assertion that the trial court should have singled out and explained the application of the evidence as to each of the affidavits upon which there had been proof, it is patent that such instructions would have been confusing to the jury and would have served only to disproportionately emphasize those particular ingredients of the government's case.

The jury was instructed that "(T)he statute of limitations is the period of five years immediately preceding the filing of the indictment * * * on November 16, 1956. Thus, the prosecution must prove * * * that the conspiracy continued and that one of the overt acts alleged in the indictment was committed after November 16, 1951." Appellants say that the 1954 Amendment to 18 U. S. C. A. 3282,[5] extending the applicable period of limitations from three to five years, should not be construed as being retroactive, and that the period of limitations applicable to this case was three years. But the amendatory Act (68 Stat. 1145) specifically provided that this "* * * amendment * * * shall be effective with respect to offenses (1) committed on or after the date of enactment of this Act, or (2) committed prior to such date, if on such date prosecution therefor is not barred by provision of law in effect prior to such date." The retroactivity of the amended section is clearly stated and the trial court's instruction thereon was correct.

REVERSED, with instructions to dismiss the indictment as to appellants Durkin and Powers and to grant a new trial to appellants Dennis, Dichter, Sanderson, Skinner, Travis, Van Camp and Wilson.

---

[5] This section, as amended, provides that "(E)xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found * * * within five years next after such offense shall have been committed."

APPENDIX A3

Opinion of District Court, Denying Motion to Dismiss the Indictment (*United States* v. *Pezzati, et al.*, 160 F. Supp. 787)

KNOUS, *Chief Judge.* The defendants have interposed a motion to dismiss the Indictment. Extended oral arguments on the motion were heard following which the parties were requested by the Court to submit memoranda on the points and authorities upon which they relied. While several alleged grounds for dismissal were enumerated in the motion, the arguments and memoranda submitted by counsel primarily have been directed to the contention of the defendants that the Indictment does not state facts sufficient to constitute an offense against the United States.

The indictment charges conspiracy to defraud the United States. It covers the period from June 15, 1949, to the date of the return of the indictment, November 16, 1956. The defendants are fourteen officials and employees of the International Union of Mine, Mill and Smelter Workers, a labor organization within the meaning of the Labor Management Relations Act of 1947 (29 U. S. C. 152(5)). The charge is that the defendants were members of and affiliated with the Communist Party and conspired with each other and with other persons both named and unknown:

> (1) Fraudulently to effectuate on behalf of the Union a compliance with section 9(h) of the Labor Management Relations Act of 1947 by means of false and fraudulent statements made to the National Labor Relations Board, an agency of the United States;
>
> (2) Fraudulently to obtain and use for the Union the services and facilities of the Board without a good faith qualification of the Union, and

(3) To pervert and defeat the proper administration of the 1947 Act by the Board.

The indictment asserts, inter alia, that as a part of the conspiracy the defendants would:

(1) File with the Board non-Communist affidavits which would falsely and fraudulently represent that certain Union officers were not members of and affiliates with the Communist Party;

(2) Fraudulently induce the Board to issue to the Union certificates of compliance with section 9(h) of the 1947 Act and fraudulently obtain from the Board the right to make use of the services and facilities of the Board;

(3) With knowledge of the false and fraudulent character of the affidavits and of the fraudulent compliance with section 9(h), use the services and facilities of the Board on behalf of the Union.

The indictment alleges twenty-one overt acts. The first in point of time is said to have occurred on July 19, 1949, and the last on August 11, 1955.

Section 9(h) of the Labor Management Relations Act of 1947 (29 U. S. C. 159(h)) reads:[1]

Section 35A of the Criminal Code referred to in the above-quoted statute was repealed by the Act of June 25, 1948, 62 Stat. 862, and is now covered by various sections of Title 18 U. S. C. Of these, only 18 U. S. C. § 1001 is pertinent. It provides:[2]

The indictment charges a violation of 18 U. S. C. § 371 which, so far as pertinent, provides:[3]

---

[1] The court quoted Section 9(h).

[2] The court quoted Section 1001.

[3] The court quoted Section 371.

Appendix A3

The position of the Government is that the indictment charges a conspiracy "to defraud the United States" and *not* a conspiracy to commit offenses.

Hence, the argument of defense counsel that the indictment is insufficient to state an offense under the conspiracy to commit offenses clause of section 371, supra, need not be considered since, as has been stated, the Government relies solely on the sufficiency of the indictment to charge a conspiracy to defraud the United States.

The fraud on the United States is alleged by the Government to be the use of the facilities and services of the Board for the Union after the fraudulent compliance with section 9(h) by filing of the non-Communist affidavits required by section 9(h) of the 1947 Act. As noted above, this section provides that before a union has certain rights under the Act affidavits must be filed with the Board stating that union officers are free from membership in or affiliation with the Communist Party.

Section 9(h) does not violate the Federal Constitution (*American Communications Association* v. *Douds* (1950), 339 U. S. 382). As stated by the United States Supreme Court, the purposes of section 9(h) are:

> (1) "to protect the public not against what Communists * * * advocate or believe, but against what Congress has concluded they have done and are likely to do again" (*American Communications Association* v. *Douds, supra,* p. 396).
>
> (2) to "wholly eradicate and bar from leadership in the American labor movement, at each and every level adherents to the Communist party and believers in the unconstitutional overthrow of our Government" (*National Labor Relations Board* v. *Highland Park Co.,* (1951) 341 U. S. 322, 325);
>
> (3) "to stop the use of the Labor Board by union leaders unwilling to be limited in government by the processes of reason" (*National Labor Relations Board* v. *Dant,* (1953) 344 U. S. 375, 385).

Appendix A3

Upon their voluntary compliance with the conditions prescribed, section 9(h) makes available to labor organizations the benefits and advantages arising from

(1) the Board's investigation of questions raised by labor organizations concerning the representation of employees, and

(2) the Board's issuance of complaints pursuant to a charge made by a labor organization (*United Mine Workers* v. *Arkansas Oak Flooring Co.* (1956), 351 U. S. 62, 70, 73).

These rights are of the utmost importance to trade unions. As said in *American Communications Association* v. *Douds, supra,* p. 390:

"The fact is that § 9(h) may well make it difficult for unions to remain effective if their officers do not sign the affidavits."

Section 9(h) makes Section 35A of the Criminal Code applicable to the required affidavits. In *Leedom* v. *International Union of Mine, Mill and Smelter Workers* (1956), 352 U. S. 145, and *Amalgamated Meat Cutters, etc.,* v. *National Labor Relations Board* (1956), 352 U. S. 153, it was held that (352 U. S. 156):

"• • • the sole sanction for the filing of a false affidavit under § 9(h) is the criminal penalty imposed on the officer who files a false affidavit, not decompliance of the union nor the withholding of the benefits of the Act that are granted once the specified officers file their § 9(h) affidavits."

The prosecution here is for conspiracy to defraud in violation of the general conspiracy statute, section 371. It is not a prosecution under section 1001, the false statements

statute. In *Leedom* v. *International Union of Mine, Mill and Smelter Workers, supra*, p. 148, the Court said, with reference to section 9(h):

> "We start with a statutory provision that contains only one express sanction, viz., prosecution for making a false statement."

The first question is whether a prosecution under section 371 may be maintained. Section 9(h) does not expressly repeal section 371. It is a cardinal rule of construction that repeals by implication are not favored (*United States* v. *Borden* (1939), 308 U. S. 188, 198). Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law (*Rosenberg* v. *United States* (1953), 346 U. S. 273, 294). The existence of a specific criminal statute or a reference thereto such as appears in section 9(h) does not preclude prosecution under other applicable statutes (cf. *Edwards* v. *United States* (1941), 312 U. S. 473, 483-484; *United States* v. *Gilliland* (1941), 312 U. S. 86, 95-96; *Wallenstein* v. *United States* (1928), 3 Cir., 25 F. (2d) 708). As I read *Leedom* v. *International Union, supra*, it does not preclude a prosecution under section 371 for conspiracy to defraud the United States by perverting the lawful function of the Board by means of deceit and chicanery.

Defendants argue that fraud is not an essential element of an offense covered by section 1001 and that a conspiracy to commit a statutory offense of which fraud is not an essential element is punishable only under the offense clause of section 371. From these premises they conclude that this indictment admittedly based upon the conspiracy to defraud clause of section 371 must fall. Defendants cite numerous cases arising under the Wartime Suspension of Limitations Act (18 U.S.C. § 3287) and comparable statutes. These statutes, among other things, extended the period of limitations applicable to offenses involving any fraud or

attempted fraud against the United States. There provisions have been determined to apply only to offenses involving a fraud of a pecuniary nature or to offenses of which fraud is an essential ingredient (*Bridges* v. *United States* (1953), 346 U. S. 209, 221—conspiracy to defraud by false statement in naturalization proceeding; *United States* v. *Grainger* (1953), 346 U. S. 235, 244—conspiracy to defraud by false claims; *United States* v. *Scharton* (1932), 285 U. S. 518, 521—income tax evasion; *United States* v. *McElvain* (1926), 272 U. S. 633, 638—conspiracy to defraud by false income tax returns; *United States* v. *Noveck* (1926), 271 U. S. 201, 203—perjury; *Marzani* v. *United States* (1948), C.A.D.C., 168 F. (2d) 133, 135-137, affirmed without opinion by equally divided court, 335 U. S. 895, 336 U. S. 922—False Claims Act; *United States* v. *Obermeier* (1950), 2 Cir., 186 F. (2d) 243, 256-257, certiorari denied 340 U. S. 951—false statement in naturalization proceedings; *United States* v. *Klinger* (1952), 2 Cir., 199 F. (2d) 645, affirmed by equally divided court, 345 U. S. 979—conspiracy to defraud by obstructing the lawful functioning of the Office of Price Administration in the rationing of sugar; *United States* v. *Lurie* (1955), 7 Cir., 222 F. (2d) 11, 13-15, certiorari denied 350 U. S. 835—conspiracy to defraud by false statements made to War Assets Corporation and War Assets Administration in connection with administration of sale of surplus property under the Surplus Property Act of 1944; cf. *United States* v. *Showalter*, (1952) D.C.N.D. California, 103 F. Supp. 806—violation of Servicemens' Dependents Allowance Act).

These cases merely hold that for the suspension of limitations acts to be effective there must be an offense involving a pecuniary loss or an offense of which fraud is an essential ingredient. In none of those cases is there a holding that the indictment or information then under consideration failed to state an offense against the United States.

Appendix A3

The fallacy of defendants' argument lies in the premise that the indictment here charges a conspiracy to commit a statutory offense (violation of section 1001) of which fraud is not an essential element. I do not so read the indictment. The charge here is conspiracy to defraud the United States by fraudulently effectuating a compliance with section 9(h), by fraudulently obtaining for the Union the use of the facilities of the Board, and by perverting and defeating the administration of the 1947 Act by the Board. The use of allegedly false non-Communist affidavits was only an incident of the conspiracy.

In a conspiracy charge the conspiracy is the gist of the offense (*Braverman* v. *United States* (1942), 317 U. S. 49, 54). This prosecution is not laid under section 1001. The question of whether fraud is an essential element of an offense under section 1001 is immaterial. Instead we have the question of whether the indictment sufficiently charges, under section 371, conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose."

The statute is broad enough to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of the federal government (*Haas* v. *Henkel* (1910), 216 U. S. 462, 479). The phrase "conspire * * * to defraud the United States" includes within its meaning interference with or obstruction of one of the functions of the federal government by deceit, craft, trickery, or dishonesty (*Hammerschmidt* v. *United States* (1924), 265 U. S. 182, 188).

Defendants rely heavily on *Bridges* v. *United States, supra.* As I read that decision, it does not support their arguments. The *Bridges* case specifically recognizes *Haas* v. *Henkel and Hammerschmidt* v. *United States* (see 346 U. S. 221, note 19), and points out that those cases refer to conspiracies to defraud in violation of the second clause

of the general conspiracy statute (section 371) and do not control the interpretation of the Wartime Suspension of Limitations Act. In the *Bridges* case the Court refers to *United States* v. *Cohn* (1926), 270 U. S. 339, which at page 346 distinguishes a conspiracy to defraud under the general conspiracy statute from an offense under the False Claims Act.

Under the *Leedom* and *Amalgamated Meat Cutters* cases, *supra*, the Court held that the Board could not decertify a union because false non-Communist affidavits were filed. Defendants argue from this that as the Board must proceed even in the event of false affidavits, there is no fraud on the Government. In other words, the successful operation of the fraud would deprive the transaction of its fraudulent character. This argument is refuted by its mere statement (*United States* v. *Keitel* (1908), 211 U. S. 370, 394).

In the *Leedom* case it was said (352 U. S. 148):

> "The filing of the required affidavits by the necessary officers is the key that makes available to the union the benefits of the Act."

While it may be that so far as the Board is concerned a false key is just as adequate as a true key, the persons who use that false key to unlock the door and obtain for the union benefits to which the union would not otherwise be entitled thereby defeat the purposes which the United States Supreme Court has said that Congress intended to effectuate by section 9(h). The indictment herein adequately charges a conspiracy to defraud the United States by the impairment, obstruction, and defeat of a lawful function of the Board. In my opinion, it sufficiently states an offense against the United States.

APPENDIX B

Statutes Involved

CONSTITUTION OF THE UNITED STATES:

Art. I, Sec. 9, Cl. 3 provides: No Bill of Attainder or ex post facto Law shall be passed.

The Fifth Amendment provides, in part: No person shall ——— be deprived of life, liberty, or property, without due process of law; ———.

STATUTES:

1. 18 U. S. C. 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2. 18 U. S. C. 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Appendix B

3. 29 U. S. C. 159(h) (Section 9(h) of Taft-Hartley) provided [1]:

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a change made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit, executed contemporaneously or within the preceeding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 287, 1001, 1022 and 1023 of Title 18 shall be applicable in respect to such affidavits.

4. 28 U. S. C. 1732 provides:

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

---

[1] Repealed by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business", as used in this section, includes business, profession, occupation, and calling of every kind.

5. 28 U. S. C. 1733 provides:

(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissable to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.

6. 18 U. S. C. 3500, the "Jencks" law, provides:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the

entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall deter-

mine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsection (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

FREE COPY

Office-Supreme Court, U.S.
FILED
SEP 16 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 502

RAYMOND DENNIS, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF AMICI CURIAE ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AMALGAMATED CLOTHING WORKERS OF AMERICA, AMALGAMATED MEAT CUTTERS, AMERICAN FEDERATION OF TEACHERS, INTERNATIONAL TYPOGRAPHICAL UNION, NATIONAL FARMERS UNION, TRANSPORT WORKERS UNION, UNITED AUTOMOBILE WORKERS, AND UNITED PACKINGHOUSE WORKERS

MORRIS E. LASKER
WILLIAM B. GOULD
280 Park Avenue
New York, N. Y.

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.
Attorneys for American Civil Liberties Union

JACOB SHEINKMAN
15 Union Square West
New York, N. Y.
Attorney for Amalgamated Clothing Workers

JOSEPH M. JACOBS
201 N. Wells Street
Chicago, Illinois
Attorney for Amalgamated Meat Cutters

JOHN LIGTENBERG
134 N. La Salle St.
Chicago, Illinois
Attorney for American Federation of Teachers

GERHARD P. VAN ARKEL
1730 K St., N.W.
Washington, D. C.
Attorney for International Typographical Union

CHARLES F. BRANNAN
Farmers Building
Denver, Colorado
Attorney for National Farmers Union

JOHN F. O'DONNELL
501 Fifth Avenue
New York, N. Y.
Attorney for Transport Workers Union

JOSEPH L. RAUH, JR.
1625 K St., N.W.
Washington, D. C.
Attorney for United Automobile Workers

EUGENE COTTON
105 W. Adams St.
Chicago, Illinois
Attorney for United Packinghouse Workers

INDEX

PAGE

Interest of Amici 1

Questions Presented 4

Statement of the Case 5

Reasons for Granting the Writ 5

Conclusion 12

Table of Cases and Other Authorities

Cases:

American Communications Association v. Douds, 339 U. S. 382 (1950) 7, 8, 9, 10

Aptheker v. Secretary of State, 378 U. S. 500 (1964) 9-10

Brown v. United States, 334 F. 2d 488 (9th Cir., 1965) 9, 10

Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921) 3

Gompers v. Buck's Stove & Range Co., 221 U. S. 418 (1911) 3

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229 (1917) 3

ILG v. BVD, 237 F. 2d 545 (D. C. Cir., 1956) 4

International Union of Mine, Mill & Smelter Workers v. Subversive Activities Control Board, No. 17135, D. C. Cir. 4

PAGE

Jencks v. United States, 353 U. S. 657 (1957) 4

Krulewitch v. United States, 336 U. S. 440 (1949) 4

Leedom v. International Union of Mine, Mill & Smelter Workers, 352 U. S. 145 (1956) 4

Noto v. United States, 367 U. S. 290 (1961) 10

Philadelphia Cordwainers Case (1806) 3

Travis v. United States, 247 F. 2d 130 (10th Cir., 1957) .. 4

United States v. Brown, 381 U. S. 437 (1965) 3, 4, 5, 6, 7, 8, 9

United States v. Lovett, 328 U. S. 303 (1946) 7, 8

Walker et al. v. State, 251 N. C. 465, 112 S. E. 2d 61, cert. den. 364 U. S. 832 (1960) 3

Statutes:

Labor-Management Reporting and Disclosure Act of 1959:

Section 201(d) 6

Section 504, 29 U. S. C. 504 .....3, 6, 8, 9

Taft-Hartley Act:

Section 9(h), 29 U. S. C. 159(h) 2, 4, 5, 6, 7, 8, 9, 10

18 U. S. C. 371 5

In the

Supreme Court of the United States

October Term, 1965

No. 502

Raymond Dennis, *et al.*,

Petitioners,

—v.—

United States of America,

Respondent.

BRIEF AMICI CURIAE ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AMALGAMATED CLOTHING WORKERS OF AMERICA, AMALGAMATED MEAT CUTTERS, AMERICAN FEDERATION OF TEACHERS, INTERNATIONAL TYPOGRAPHICAL UNION, NATIONAL FARMERS UNION, TRANSPORT WORKERS UNION, UNITED AUTOMOBILE WORKERS, AND UNITED PACKINGHOUSE WORKERS

Interest of Amici*

The American Civil Liberties Union is a private, nonpartisan organization engaged solely in the preservation and defense of the Bill of Rights. The National Farmers Union is an independent association of family farmers within the United States. The Amalgamated Clothing Workers, Amalgamated Meat Cutters, American Federation of Teachers, International Typographical Union,

* This brief is filed with the consent of the parties. The letters of consent have been filed with the Clerk of the Court.

Transport Workers Union, United Automobile Workers, and United Packinghouse Workers are international trade unions affiliated with the labor federation known as the AFL-CIO.

Each of the amici believe that the constitutionality of Section 9(h) of the Taft-Hartley Act, the statute upon which the convictions in this case rest, is seriously in doubt. That statute, prior to its repeal in 1959, foreclosed a trade union's access to the services of the National Labor Relations Board if its officers did not file affidavits of non-membership or affiliation with the Communist Party.

Amici are especially interested in this case because they are opposed to government-imposed loyalty tests, both in general and as a pre-requisite for holding office or employment in a private organization. They are opposed in particular to such tests as a condition for the receipt of a benefit otherwise made freely available by statute.

It is, of course, a matter of public knowledge that the International Union of Mine, Mill and Smelter Workers, with which each of the petitioners is or was affiliated as an officer or employee, was expelled from the CIO (with which the Clothing Workers, the Transport Workers, the Automobile Workers and the Packinghouse Workers were then affiliated) in 1949 because it was found by the appropriate agencies of that body to be dominated by members of the Communist Party. That, however, was a decision freely arrived at after open debate by a private association whose members and officers, responsible for the association's integrity, concluded that such domination was inconsistent with the principles of free trade-unionism. The fact that that kind of decision may be made and acted upon by a private association is no justification in law or policy

for similar decisions to be thrust upon it involuntarily by the power of the government.

In essence, it is the belief of each of the amici that a mature trade union movement is capable of determining its own internal policies without the kind of governmental compulsion reflected either in Section 9(h) or in its successor statute, Section 504 of the Labor-Management Reporting and Disclosure Act, which was held unconstitutional in *United States* v. *Brown*, 381 U. S. 437 (1965).

Amici further believe that the use of the conspiracy doctrine in this case presents several issues which warrant review by the Court.

Since the 1806 *Philadelphia Cordwainers'* decision by Recorder Levy, and down through *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229 (1917); *Lawlor* v. *Loewe*, 235 U. S. 522 (1915) (The Danbury Hatters); *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418 (1911); and *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443 (1921), the conspiracy concept has been invoked to thwart union growth and effectiveness and to punish persons who have not directly participated in the activity alleged to be criminal.

This is not just a matter of history. Within recent years the Southern leadership of the Textile Workers Union of America was indicted for "conspiracy" in connection with strike violence in Henderson, North Carolina, *Walker et al.* v. *State*, 251 N. C. 465, 112 S. E. 2d 61, cert. den. 364 U. S. 832 (1960); the International Ladies Garment Workers Union was sued when some local strikers and local officials allegedly burned a struck plant in Hillsboro, North Carolina; and until reversed, the Labor Board during the 1950's had

a doctrine which punished all strikers for the unlawful conduct of any picketer. See *ILG* v. *BVD*, 237 F. 2d 545 (D. C. Cir., 1956).[1]

The labor movement, in short, has first hand knowledge that "conspiracy" is an "elastic, sprawling and pervasive offense", that "the looseness and pliability of the doctrine presents inherent dangers", that a conspiracy charge imposes "an especially difficult situation for the defendant", and that the prosecution chooses the conspiracy indictment "chiefly to get procedural advantages to ease the way to conviction". *Krulewitch* v. *United States*, 336 U. S. 440 at 445, 449, 453, 457 (1949) (Mr. Justice Jackson concurring).

Questions Presented

This brief is restricted to the following questions:

1. Whether, in light of *United States* v. *Brown*, 381 U. S. 437 (1965), Section 9(h) of the Taft-Hartley Act is unconstitutional.
2. Whether in this conspiracy prosecution the trial court erred in:
   a. excluding evidence favorable to the defendants; and
   b. incorrectly instructing the jury on the reliability of government witnesses.

---

[1] The Mine-Mill Workers itself has been subjected to a series of acts by the federal government intended to thwart its effectiveness. In addition to the case at bar, see *Jencks* v. *United States*, 353 U. S. 657 (1957); *Leedom* v. *International Union of Mine, Mill & Smelter Workers*, 352 U. S. 145 (1956); *Travis* v. *United States*, 247 F. 2d 130 (10th Cir., 1957); *International Union of Mine, Mill & Smelter Workers* v. *Subversive Activities Control Board*, No. 17135, D. C. Cir. (pending).

Statement of the Case

The petitioners, all of whom were or had been officers or staff employees of the International Union of Mine, Mill and Smelter Workers, were indicted in 1956 for conspiring to defraud the United States government in violation of the fraud clause of the general conspiracy statute, 18 U. S. C. 371. The gravamen of the indictment charged that petitioners conspired to defraud the government by falsely denying that they were members of or affiliated with the Communist Party, as required by Section 9(h) of the Taft-Hartley Act, repealed in 1959. The affidavits in question were filed from 1949 to 1955. The testimony at trial concerned acts by individual defendants over a period of seven years and in such diverse locations as Cleveland, Ohio, Bessemer, Alabama, and Denver, Colorado. At least one of the government witnesses was a co-conspirator whose nolo contendere plea was then under advisement.

Petitioners' convictions at their first trial in 1959 were reversed on appeal. *Dennis* v. *United States*, 302 F. 2d 5 (10th Cir., 1962). Their subsequent conviction on retrial was affirmed 346 F. 2d 10 (10th Cir., 1965). This brief is filed in support of a petition for certiorari to review that affirmance.

Reasons for Granting the Writ

1. Section 9(h) of Taft-Hartley Act, 29 U. S. C. 159(h), had "conditioned a union's access to the National Labor Relations Board upon the filing of affidavits by all of the union's officers attesting that they were not members of or affiliated with the Communist Party." *United States* v. *Brown*, 381 U. S. 437 (1965).

In 1959, Congress enacted the Labor-Management Reporting and Disclosure Act (73 Stat. 519), Section 504 of which "was enacted to replace Section 9(h) of the Taft-Hartley Act." *United States* v. *Brown, supra,* at 439. Section 504 made it a crime for a member of the Communist Party to serve as an officer or as an employee of a labor union. By Section 201(d) of the Act, Section 9(h) of Taft-Hartley was simultaneously repealed.

> "Section 504 [of the Act of 1959] was designed to accomplish the same purpose as Section 9(h), but in a more direct and effective way. H.R. Rep. No. 741, 86th Cong. 1st Sess., p. 33; H.R. Rep. No. 1147, 86th Cong. 1st Sess., p. 36." *United States* v. *Brown, supra,* at 439, n. 2.

In 1961 Archie Brown, a member of the Executive Board of Local 10 of the International Longshoremen's and Warehousemen's Union, was indicted and convicted for violating Section 504. His conviction was reversed by the Court of Appeals for the Ninth Circuit, sitting en banc, on the ground that Section 504 violated the First and Fifth Amendments to the Constitution. This Court granted certiorari and affirmed the reversal of the conviction on the ground that Section 504 was unconstitutional as a Bill of Attainder. We contend here that the Court's conclusion in *Brown* that Section 504 of the 1959 Act was "enacted to replace Section 9(h) of the Taft-Hartley Act," and "was designed to accomplish the same purpose as Section 9(h)," in conjunction with its holding that Section 504 was unconstitutional, compels the conclusion that Section 9(h) of Taft-Hartley is constitutionally invalid.

Mr. Chief Justice Warren expressed the basis for the unconstitutionality of Section 504 in the following language:

"The statute does not set forth a generally applicable rule declaring that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party." *United States* v. *Brown, supra,* at 450.

This Court's reasoning in *Brown* applies with equal vigor to the instant case. With Section 9(h), as with Section 504, the Constitution's proscription of bills of attainder has been violated.

Second, this Court in *Brown* severely eroded the foundation of *American Communications Association* v. *Douds,* 339 U. S. 382 (1950), which upheld the constitutionality of Section 9(h), by finding that its reading of *United States* v. *Lovett,* 328 U. S. 303 (1946), was erroneous:

"We think that the Court in *Douds* misread *United States* v. *Lovett* when it suggested, 339 U. S. at 413, that that case could be distinguished on the ground that the sanction there imposed was levied for purely retributive reasons." *United States* v. *Brown, supra,* at 460.

Since the *Douds'* view that the absence of retribution in 9(h)—that is, the absence of the application of that provision to former members of the Communist Party—was determinative of the question whether 9(h) was puni-

tive, has now been rejected, the conclusion that a very significant portion of the *Douds* rationale is mistaken, or at best irrelevant, must follow. For it was the very absence of this kind of retribution in 9(h) which permitted *Douds* to avoid this Court's previous decisions and thus leave that provision intact. It is particularly important here, of course, that the treatment by the *Douds* decision of both *Lovett* and the question of retribution took place within the discussion of Section 9(h)'s constitutionality under the Bill of Attainder Clause.

Third, though this Court in *Brown* distinguished *Douds* as "not necessarily controlling," pointing out that under Section 9(h) Communist Party members could escape from the specified class simply through resignation, it nevertheless left open to attack the weight accorded this factor in *Douds:*

> "We do not read either opinion [*Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, or *Douds*] to have set up inescapability as an absolute pre-requisite to a finding of attainder. Such an absolute rule would have flown in the face of explicit precedent, *Cummings* v. *Missouri,* 4 Wall. 277, 324, as well as the historical background of the constitutional prohibition." *United States* v. *Brown, supra,* at 457, n. 32.

Fourth, it should be noted that this Court, in striking down Section 504, viewed its purpose as "preventive" and similar to those of a number of English bills of attainder. This Court said that both the former and the latter were the result of legislative judgments " . . . based largely on past acts and associations . . . that a given person or group was likely to cause trouble (usually, overthrow the govern-

ment) and therefore inflicted deprivation upon that person or group in order to keep them from bringing about the feared event." *United States* v. *Brown, supra,* at 458-459. Not only does this description perfectly fit Section 9(h), but the Court also suggested that Section 9(h) as construed in *Douds,* Section 504, and several early English and American bills of attainder, had similar legislative histories. *United States* v. *Brown, supra,* at 458-460. Truly, Section 9(h) is the ". . . legislative punishment, of any form or severity, of specifically designated persons or groups" to which this Court pledged unceasing hostility in *Brown.*

Fifth, four Justices of this Court subscribe to the following viewpoint articulated in Mr. Justice White's dissenting opinion in *Brown:*

> "*American Communications Assn.* v. *Douds,* 339 U. S. 382, which upheld the predecessor statute to §504 is obviously overruled . . . The Bill of Attainder Clause now forbids Congress to do precisely what was validated in Douds." *United States* v. *Brown, supra,* at 464-465.

Finally, we also urge that the Ninth Circuit's holding in *Brown* v. *United States,* 334 F. 2d 488 (9th Cir., 1965) provides a further ground upon which these convictions should be reviewed and reversed. More precisely, it is our position that Section 9(h) is an unconstitutional restraint on freedom of association and that, as was said by the Ninth Circuit in *Brown,* ". . . the relationship between the conduct or status punished and the evil intended here to be prevented is not sufficiently close or substantial to meet the requirements of either the First or Fifth Amendments . . ." 334 F. 2d at 496. Cf. *Aptheker* v. *Secretary*

of State, 378 U. S. 500 (1964); *Noto* v. *United States*, 367 U. S. 290 (1961). It is our belief that regardless of whether *Brown* can be said to overrule *Douds*, when two provisions such as Sections 504 and 9(h) are so closely related in purpose and effect, fairness and the obvious advantages of clarity require the conclusion that certiorari be granted to review the convictions below.

2. In a conspiracy indictment concerning the actions of fourteen defendants (some known Communists) covering a seven-year span and the geographical limits of the United States, it is essential for due process requirements that (a) all evidence favorable to the defendants be introduced before the jury and that (b) the jury be instructed on the reliability of the government witnesses. The record in this case indicates a failure in both respects.

a. The issue before the jury in this case was whether petitioners had decided to file the 9(h) affidavits as a result of a conspiracy by the Communist Party (as alleged by the government) or as a result of trade union necessity determined freely, openly and democratically by the membership (as contended by the defendants). The trial court permitted wide latitude in the testimony of the government in this regard, but cut off and precluded the jury's consideration of the defendants' testimony on this crucial issue of fact. The defendants below sought to controvert the inference of "parallelism" between Mine-Mill and Communist Party compliance policies by showing "parallelism" between Mine-Mill and many other trade unions. Defendants offered a certified list compiled by the National Labor Relations Board showing when compliance was effected by labor organizations. The accuracy and authenticity of this list was unchallenged, but the court sustained the prosecu-

tion's objection to its admissibility. The correctness of this exclusion in a mass conspiracy trial raises important due process considerations.

b. Some of the government's witnesses were former union officials and "accomplices". Prosecution witness Lawrence, one of the fourteen indicted defendants, had pleaded nolo contendere prior to trial. He was an important witness, testifying to events in Bessemer, Alabama.

The defense requested a charge that "accomplice testimony . . . be received with the greatest care and caution." The trial judge refused to so charge.

The Court of Appeals affirmed the trial court on the ground that the instruction cautioning the jury with respect to the testimony of former Communist Party members and "so-called informers" was sufficient to caution the jury concerning the treatment to be accorded the testimony of these witnesses. But this charge to the jury emphasized in closing that "A witness who is a former member of the Communist Party or an informer or who by reason of interest, hostility, bias or hope of reward might be induced to give false testimony may nevertheless testify accurately and truthfully. If you find that such witness has testified truthfully, then such testimony is as good as the truth testified from any other source."

Whether, in the context of a conspiracy trial, the refusal to grant a cautionary "accomplice" instruction is excused because this other cautionary instruction, based on quite different grounds, is given, raises important due process considerations.

CONCLUSION

For the reasons stated above, we urge that certiorari be granted.

Respectfully Submitted

MORRIS E. LASKER
WILLIAM B. GOULD
280 Park Avenue
New York, N. Y.

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.
Attorneys for American Civil Liberties Union

JACOB SHEINKMAN
15 Union Square West
New York, N. Y.
Attorney for Amalgamated Clothing Workers

JOSEPH M. JACOBS
201 N. Wells Street
Chicago, Illinois
Attorney for Amalgamated Meat Cutters

JOHN LIGTENBERG
134 N. LaSalle Street
Chicago, Illinois
Attorney for American Federation of Teachers

GERHARD P. VAN ARKEL
1730 K St., N.W.
Washington, D. C.
Attorney for International Typographical Union

CHARLES F. BRANNAN
Farmers Building
Denver, Colorado
Attorney for National Farmers Union

JOHN F. O'DONNELL
501 Fifth Avenue
New York, N. Y.
Attorney for Transport Workers Union

JOSEPH L. RAUH, JR.
1625 K St., N.W.
Washington, D. C.
Attorney for United Automobile Workers

EUGENE COTTON
105 W. Adams St.
Chicago, Illinois
Attorney for United Packinghouse Workers

INDEX

	Page
Opinions below	1
Jurisdiction	1
Constitutional provisions and statutes involved	2
Questions presented	2
Statement	2
Argument	6
Conclusion	25

CITATIONS

Cases:	
Amalgamated Meat Cutters v. *National Labor Relations Board*, 352 U.S. 153	10
American Communications Assn. v. *Douds*, 339 U.S. 382	10, 13, 14
Aptheker v. *Secretary of State*, 378 U.S. 500	13
Bary v. *United States*, 292 F. 2d 53	15
Berenbeim v. *United States*, 164 F. 2d 679, certiorari denied, 333 U.S. 827	9
Berry v. *United States*, 295 F. 2d 192, certiorari denied, 368 U.S. 955	15
Boehm v. *United States*, 123 F. 2d 791, certiorari denied, 315 U.S. 800	12
Bridges v. *United States*, 346 U.S. 209	7, 8, 9
Brilliant v. *United States*, 297 F. 2d 385, certiorari denied, 369 U.S. 871	15
Caminetti v. *United States*, 242 U.S. 470	22
Campbell v. *United States*, 373 U.S. 487	18
Carter v. *Texas*, 305 U.S. 557	12
Communist Party of the United States v. *Subversive Activities Control Board*, 367 U.S. 1	14
Curley v. *United States*, 130 Fed. 1, certiorari denied, 195 U.S. 628	9
Delaney v. *United States*, 263 U.S. 586	23
Fiswick, v. *United States*, 329 U.S. 211	9
Glasser v. *United States*, 315 U.S. 66	24
Gordan v. *United States*, 299 F. 2d 117	15

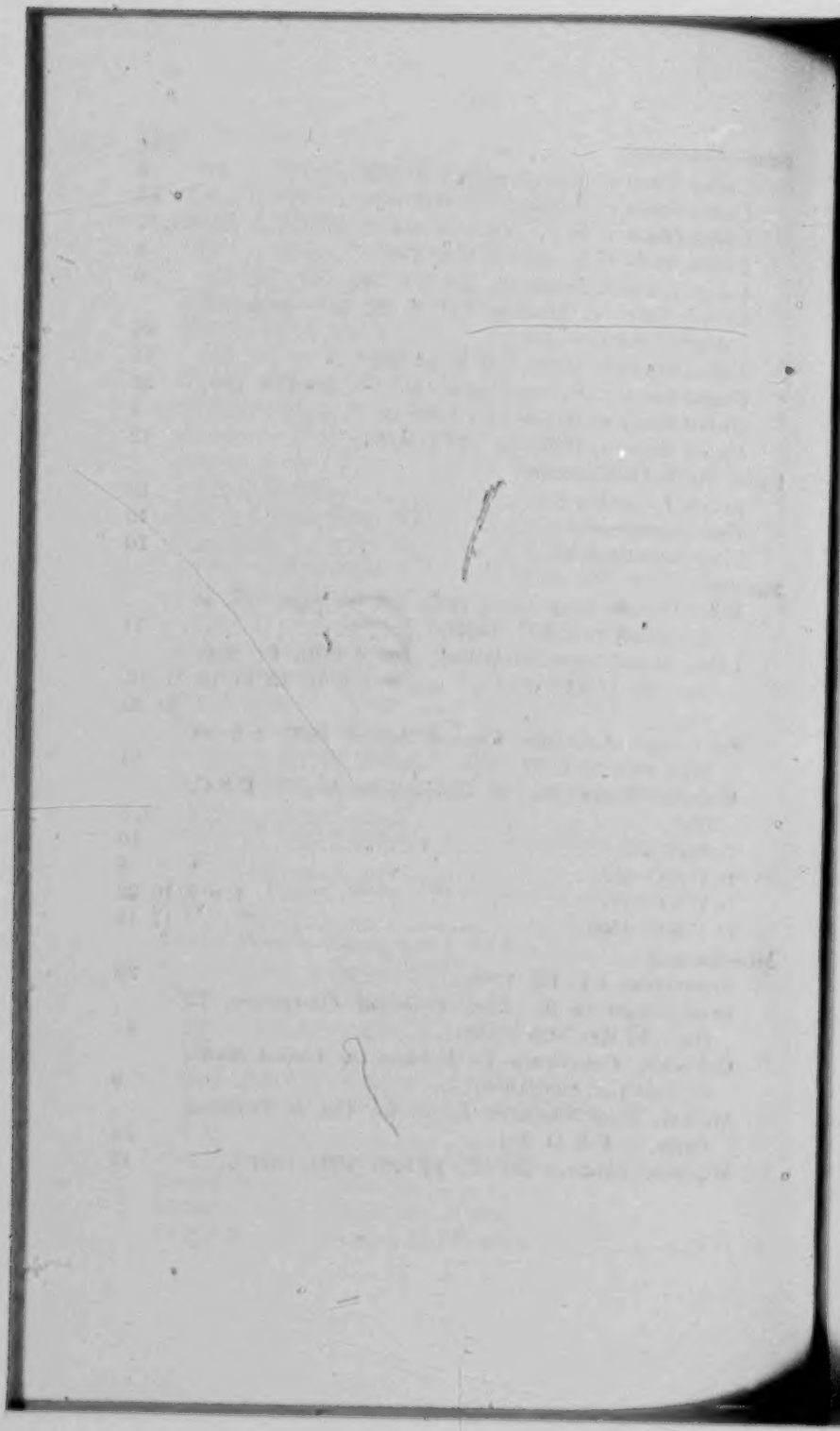
791-189—65——1

Cases—Continued

	Page
Haas v. *Henkel*, 216 U.S. 462	8
Hammerschmidt v. *United States*, 265 U.S. 182	8
Hance v. *United States*, 299 F. 2d 389	15
Heald v. *United States*, 175 F. 2d 878, certiorari denied, 338 U.S. 859	9
Hills v. *United States*, 97 F. 2d 710	9, 12
Humble Oil & Refining Co. v. *United States*, 198 F. 2d 753, certiorari denied, 344 U.S. 909	12
Hyde v. *Schine*, 199 U.S. 62	9
Hyde v. *United States*, 225 U.S. 347	9
Jackson v. *United States*, 297 F. 2d 195	15
Joyce v. *United States*, 153 F. 2d 364, certiorari denied, 328 U.S. 860	9
Kelly v. *United States*, 303 U.S. 1	11
Krulewitch v. *United States*, 336 U.S. 440	21
Leedom v. *International Union of Mine, Mill & Smelter Workers*, 352 U.S. 145	9
Lutwak v. *United States*, 344 U.S. 604	9
Mattox v. *United States*, 156 U.S. 237	17, 18
Mendelson v. *United States*, 58 F. 2d 532	25
Nye & Nissen v. *United States*, 336 U.S. 613	9
Ogden v. *United States*, 303 F. 2d 724	12, 19
Palermo v. *United States*, 360 U.S. 343	17
Parr v. *United States*, 265 F. 2d 894, reversed, 363 U.S. 370	15
Pittsburgh Plate Glass Co. v. *United States*, 360 U.S. 395	14, 15
Travis v. *United States*, 269 F. 2d 928, reversed, 364 U.S. 631	15, 20
United States v. *Barra*, 149 F. 2d 489	12
United States v. *Bentvena*, 319 F. 2d 916	25
United States v. *Bertucci*, 333 F. 2d 292, certiorari denied *sub nom. Doherty* v. *United States*, 379 U.S. 839	16
United States v. *Boyance*, 329 F. 2d 372, certiorari denied *sub nom Feldman* v. *United States*, 377 U.S. 965	14, 15
United States v. *Brown*, 381 U.S. 437	13, 14
United States v. *Butler*, 297 U.S. 1	11
United States v. *Cohn*, 270 U.S. 339	9
United States v. *Giampa*, 290 F. 2d 83	15

Cases—Continued

	Page
United States v. *Grainger*, 346 U.S. 235	8
United States v. *Johnson*, 319 U.S. 503	23
United States v. *Kapp*, 302 U.S. 214	11, 12
United States v. *Keitel*, 211 U.S. 370	9
United States v. *Lepowitch*, 318 U.S. 702	9
United States v. *Manton*, 107 F. 2d 834, certiorari denied, 309 U.S. 664	24
United States v. *Meyer*, 140 F. 2d 652	11
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150	25
United States v. *Walter*, 263 U.S. 15	9
United States v. *Williams*, 341 U.S. 58	12
United States Constitution:	
Article I, Section 9	10
First Amendment	10
Fifth Amendment	10
Statutes:	
Home Owners Loan Act of 1933, § 8 (e), Stat. 135, as amended, 12 U.S.C. 1467(e)	11
Labor Management Relations Act § 9(h), 61 Stat. 146, 29 U.S.C. 9(h)	2, 3, 4, 5, 6, 10, 13, 14, 16, 17, 23, 24, 25
Subversive Activities Control Act of 1950, § 6, 64 Stat. 993, 50 U.S.C. 785	13
Wartime Suspension of Limitations Act, 18 U.S.C. 3287	7, 8
73 Stat. 525	10
18 U.S.C. 287	8
18 U.S.C. 371	7, 8, 9, 10, 22
18 U.S.C. 3500	17, 18
Miscellaneous:	
Annotation, 1 L. Ed. 1780	20
Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920 (1959)	21
Goldstein, *Conspiracy To Defraud the United States*, 68 Yale L.J. 405 (1959)	9
Mathes, *Some Suggested Forms for Use in Criminal Cases*, 20 F.R.D. 231	20
Wigmore, *Evidence* (3d ed.) §§ 1001–1003, 1021	17



In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 502

RAYMOND DENNIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is reported at 346 F. 2d 10. The prior opinion of the court of appeals, reversing petitioners' convictions after their first trial (Pet. App. A2) is reported at 302 F. 2d 5. The opinion of the district court sustaining the validity of the indictment (Pet. App. A3), which was affirmed by the court below on the first appeal, is reported at 160 F. Supp. 787.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1965 (Pet. App. A). A petition and two supplementary petitions for rehearing were denied on June 28, 1965. Mr. Justice White extended the time

for filing a petition for certiorari to August 27, 1965, and the petition was filed on August 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant constitutional and statutory provisions are set out in Appendix B to the petition.

QUESTIONS PRESENTED

1. Whether the indictment properly charged a conspiracy to defraud the United States.

2. Whether petitioners' contention that Section 9(h) of the Labor Management Relations Act was unconstitutional constitutes a defense to the crime charged in the indictment.

3. Whether the trial court committed reversible error in (a) denying petitioners' motion for the production or inspection of grand jury minutes, (b) admitting and excluding evidence, or (c) instructing the jury.

4. Whether there was sufficient evidence to support petitioners' convictions.

STATEMENT

After a trial by jury, petitioners were convicted of conspiring, between June 15, 1949, and the date of indictment, November 16, 1956, to defraud the United States by fraudulently obtaining the services of the National Labor Relations Board for the benefit of the International Union of Mine, Mill and Smelter Workers ("Mine-Mill"). The means for accomplishing this end, according to the indictment, was the filing by

Mine-Mill officers of affidavits falsely stating that they were not members of the Communist Party. Non-Communist affidavits were, at the time, prerequisites to obtaining the Board's services under Section 9(h) of the Labor Management Relations Act, 29 U.S.C. (1958 ed.) 159(h), repealed in 1959, 73 Stat. 525.

Petitioners' motion to dismiss the indictment for failure to state an offense was denied by the trial court (Pet. App. 37a–44a). The court of appeals affirmed the denial of the motion to dismiss, but reversed the convictions because of the admission of prejudicial hearsay evidence (Pet. App. 21a–36a). Petitioners were then retried, convicted and each sentenced to three years' imprisonment and fined $2,000 (R. 40–45). The court of appeals affirmed (Pet. App. 1a–20a), rejecting petitioners' contentions that the trial court erred in refusing them access to certain grand jury minutes, in admitting and excluding certain evidence, or in instructing the jury. As it had done on the previous appeal, the court also reviewed the record and found the evidence sufficient to support the jury's verdicts.

The evidence showed that petitioners were members of the Communist Party and officers or staff members of Mine-Mill during the relevant period (R. 220, 285–287, 456, 573),[1] that Mine-Mill and the Com-

[1] Raymond Dennis was an International Representative and later a board member; Irving Dichter was also an International Representative and later a board member; Harold Sanderson was a member of the office staff and served most of the relevant period as Assistant to the President; Albert Skinner was an International Representative and Director of the Political Action Committee; Maurice Travis was Secretary-Treasurer of

munist Party opposed compliance with Section 9(h) prior to 1949 (R. 221, 232–233, 237, 245, 289–290; Govt. Ex. 2, 3(a)); that the Party and the union changed their policies of opposition in that year (R. 296, 431–434; Govt. Ex. 6); and that, after this change of position, the petitioners who were officers of Mine-Mill submitted resignations to the Party and signed non-Communist affidavits in order to obtain for Mine-Mill the services of the NLRB (R. 432, 470, 544, 557–558; Govt. Ex. 11, 13, 14, 15). This much appears to be undisputed (Pet. 5–6; Pet. App. 3a).

The evidence relating to the background of the conspiracy showed that, prior to June 1949, the Communist Party, acting through petitioners and others, played a dominant role in the affairs of Mine-Mill (*e.g.*, Travis, Dichter and Dennis, R. 81, 84–87; Wilson, R. 428, 461). For example, when a Mine-Mill board member, Kenneth Eckert, led a drive for compliance with Section 9(h) in 1948, petitioners Travis, Dennis, and Dichter, under the guidance of a Party leader who was not a member of Mine-Mill, were instrumental in having Eckert removed from union office (R. 77–79). At around the same time, all six petitioners attended Communist Party meetings, often presided over by Party officials who were not in Mine-Mill, at which various union problems were considered, particularly the threat to Communist control of Mine-Mill posed by Section 9(h) (R. 81, 84–

---

the union until 1955; and Charles Wilson was an International Representative, then a board member, and later Vice-President for the Eastern States.

85, 87, 232–233, 236–238, 431–433). The fear was that, as petitioner Travis stated on a number of occasions, "it would behead the union, to sign the non-Communist affidavits under the Taft-Hartley Act" (R. 75, 87). The decision that Mine-Mill would not comply with Section 9(h) was "made in the Party" (R. 289), and petitioners acted in accordance with the Party's policy.

The reversal of the policy of noncompliance also emanated from Communist Party leadership. In the Spring of 1949, petitioner Travis informed witness William Mason that "the boys in the Party are considering changing our position" on Section 9(h) (R. 295; see also Wilson, R. 431–432, 466, 468–469). Shortly thereafter, the union's Executive Board, with petitioners Wilson and Sanderson in attendance, voted unanimously for compliance with the Act (R. 297–301). Thereupon, a rearrangement of the relationship of the Communist Mine-Mill officials to the Party was undertaken under the guidance of Party functionaries (Wilson, R. 432–433, 468–470; Dennis, R. 556–557). Petitioner Sanderson was given the job of coordinating the activities of Communists on Mine-Mill's staff, including the collection of Party dues (R. 472; see also R. 304–305). All Mine-Mill officials who were Communists, except petitioner Travis who made a public announcement of resignation (R. 306, 558), sent letters of resignation from the Party to local Party offices (*e.g.*, Wilson, R. 432, 475; Dennis, R. 556–557). As Travis subsequently admitted, his

791-189—65——2

resignation "was recognized pretty much as a subterfuge to avoid prosecution under Taft-Hartley and most people accepted the fact that he was still in the Communist Party" (R. 558).

After the union voted to comply with Section 9(h), Communist control of its affairs, through petitioners and others, continued (*e.g.*, Skinner, R. 443–444, 446–449, 452–453; Sanderson, R. 564). The Party dictated important decisions in the union's administration, including the selection of union officers and staff members (R. 92, 441, 551–552, 555, 560) and even the employment of office workers (R. 561). As petitioner Dichter stated in 1955 to witness Gardner—whom he was investigating for the Party because of Gardner's opposition to petitioner Travis' policies—Mine-Mill was "one of the last real strongholds of the Party where the Party voice to the trade union movement could be heard" (R. 577; see also Skinner, R. 314; Travis, R. 317–318; Wilson, R. 320, 441, 562).

On several occasions after filing the affidavits called for by Section 9(h), petitioners sought and obtained for the Mine-Mill the services of the National Labor Relations Board (Skinner, Govt. Ex. 18, 19; Dennis, Govt. Ex. 20; Wilson, Govt. Ex. 21; Dichter, Govt. Ex. 22).

ARGUMENT

1. Petitioners acknowledge that "[t]he indictment explicitly charges a conspiracy to defraud the United States by fraudently obtaining for Mine-Mill the services and facilities of the National Labor Relations Board (R. 4)" (Pet. 8). Relying primarily on

Bridges v. *United States*, 346 U.S. 209, however, they contend that the indictment fails to state an offense under 18 U.S.C. 371 on the ground that the method of defrauding the United States alleged therein involves commission of another offense of which "fraud" is not an essential element (Pet. 8–11). The argument is without merit. Not only do the cases cited by petitioners fail to sustain their contention, but their position is refuted by numerous decisions in this Court and the court of appeals.

Bridges involved the Wartime Suspension of Limitations Act, 18 U.S.C. 3287, which extended the statute of limitations on a limited class of wartime frauds. Primarily on the basis of legislative history, the Court held that the Suspension Act applied "only where the fraud is of a pecuniary nature or at least of a nature concerning property" (346 U.S. at 215). Finding that the offense there charged—a conspiracy to cause the filing of false statements in a naturalization proceeding—did not involve the pecuniary or proprietary interests of the federal government (346 U.S. at 221), the Court ruled that the statute of limitations had not been suspended. An alternate ground of decision in *Bridges* was that Congress intended to extend the limitations period only for offenses of which fraud was an essential element (346 U.S. at 221). Recognizing that "fraud often accompanies" the offense there charged (346 U.S. at 222), the Court ruled that the offense might nevertheless be proved without a showing of fraud and accordingly

concluded that the limitations period was not suspended by the Act.

Nothing in *Bridges*[2] purported to affect the traditional scope of 18 U.S.C. 371. Indeed, while giving a narrow reading to the Suspension Act, the Court expressly recognized the broad reach of Section 371 and noted that cases dealing with the breadth of the conspiracy statute "do not control the interpretation of the provisions in the Wartime Suspension of Limitations Act discussed in this opinion" (346 U.S. at 221, n. 19). It follows that cases dealing with the meaning of the Suspension Act do not control the scope of 18 U.S.C. 371.

Section 371 proscribes conspiracies to defraud the United States "in any manner or for any purpose * * *." It is well settled that this offense is not limited to attempts to obtain monetary benefits from the government. *Haas* v. *Henkel*, 216 U.S. 462, 479; *Hammerschmidt* v. *United States*, 265 U.S. 182. Numerous cases in this Court and the courts of appeals involving the conspiracy-to-defraud provision reveal that the offense clearly includes an agreement to seek, by means of a false representation, a benefit from the government which would not be conferred if a truth-

[2] Petitioners also rely on *United States* v. *Grainger*, 346 U.S. 235, decided the same day as *Bridges*, in which the Court applied its interpretation of the Suspension Act to a prosecution for filing, and conspiring to file, false claims in violation of 18 U.S.C. 287. The Court found the Suspension Act applicable there because the pecuniary interests of the government were affected. Like *Bridges*, *Grainger* has no bearing on the case at bar.

ful representation were made.[3] Such an offense was concededly charged in the present indictment.

The conspiracy-to-defraud statute protects the government's legitimate interest in having its laws operate according to their tenor, on the basis of truthful, rather than falsified, information. Interference with this interest, as was charged here, is the gist of the "fraud", as that term is used in Section 371.[4] Contrary to petitioners' suggestion (Pet. 9), it is immaterial that Congress refused to permit the validity of the non-Communist affidavits—required of all union officers seeking the services of the NLRB—to be challenged before the Board[5] (*Leedom* v. *International*

[3] See, *e.g.*, *Lutwak* v. *United States*, 344 U.S. 604 (decided the same term as *Bridges*); *Nye & Nissen* v. *United States*, 336 U.S. 613; *Fiswick* v. *United States*, 329 U.S. 211, 213; *United States* v. *Walter*, 263 U.S. 15; *Hyde* v. *United States*, 225 U.S. 347; *United States* v. *Keitel*, 211 U.S. 370, 392; *Heald* v. *United States*, 175 F. 2d 878, 880 (C.A. 10), certiorari denied, 338 U.S. 859; *Berenbeim* v. *United States*, 164 F. 2d 679, 682-683 (C.A. 10), certiorari denied, 333 U.S. 827; *Joyce* v. *United States*, 153 F. 2d 364 (C.A. 8), certiorari denied, 328 U.S. 860; *Hills* v. *United States*, 97 F. 2d 710, 713 (C.A. 9); *Curley* v. *United States*, 130 Fed. 1 (C.A. 1), certiorari denied, 195 U.S. 628; cf. *United States* v. *Lepowitch*, 318 U.S. 702, 704, construing "intent to defraud" in former 18 U.S.C. 76 (now 18 U.S.C. 912), as requiring not "more than that the defendants have * * * sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct."

[4] "If falsehood had been made to take the place of facts in connection with a lawful function of government, then enough 'fraud' existed to qualify as the unlawful object of a conspiracy." Goldstein, *Conspiracy To Defraud the United States*, 68 Yale L.J. 405, 422 (1959); see *Hyde* v. *Schine*, 199 U.S. 62, 82-83; *United States* v. *Cohn*, 270 U.S. 339, 346.

[5] The reason for this refusal was to obviate the infinite delays in Board proceedings which Congress feared might otherwise occur (352 U.S. at 150).

Union of Mine, Mill & Smelter Workers, 352 U.S. 145; *Amalgamated Meat Cutters* v. *National Labor Relations Board*, 352 U.S. 153). Congress' exclusive reliance on criminal sanctions to enforce Section 9(h) in no way mitigates either the falsity of the affidavits involved in this case or their use fraudulently to obtain NLRB services which Congress intended to be withheld.

2. Petitioners contend (Pet. 11–12) that their convictions for violating 18 U.S.C. 371 by conspiring fraudulently to obtain the services of the NLRB should be reversed on the ground that Section 9(h) of the Labor Management Relations Act, held valid by this Court in 1950 (*American Communications Assn.* v. *Douds*, 339 U.S. 382) and repealed in 1959 (73 Stat. 525), is unconstitutional.[8] But there is no reason to reconsider the constitutional question here, for petitioners would not be entitled to a reversal of their convictions even if—contrary to the holding in *Douds*—Section 9(h) were invalid. "The courts have consistently held that the unconstitutionality of the operation or proceeding in relation to which a deception was practiced is not a defense in a prosecution for such deception. As long as a department or agency has colorable authority to do what it is doing, the constitutionality of the statute or order granting the

[8] Petitioners do not specify the constitutional provisions with which Section 9(h) is claimed to conflict, but it appears that they are relying on the bill-of-attainder clause (Article I, Section 9) and the Fifth Amendment. In addition, the *amici* urge that the provision violates the First Amendment, as an interference with "freedom of association" (*Amici's Brief*, p. 9).

authority in the first place is immaterial." *United States* v. *Meyer*, 140 F. 2d 652, 655 (C.A. 2). Thus in *United States* v. *Kapp*, 302 U.S. 214, the district court had dismissed an indictment for conspiracy to defraud the United States by making false representations to secure benefits under the Agricultural Adjustment Act, on the ground that that Act had been held unconstitutional in *United States* v. *Butler*, 297 U.S. 1. In reversing that decision, this Court stated (302 U.S. at 217–218):

> Such a construction is inadmissible. It might as well be said that one could embezzle moneys in the United States Treasury with impunity if it turns out that they were collected in the course of invalid transactions. * * * Appellees were not indicted for a conspiracy to violate the Agricultural Adjustment Act but for a conspiracy to violate the statute protecting the United States against frauds. It is cheating the Government at which the statute aims and Congress was entitled to protect the Government against those who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. * * *

Similarly, in *Kay* v. *United States*, 303 U.S. 1, the petitioner sought to attack his conviction of making false statements to influence the action of the Home Owners Loan Corporation, in violation of 12 U.S.C. 1467(e), on the ground that the Home Owners Loan Act of 1933 was unconstitutional. Relying on *Kapp*, the Court held that "[t]here is no occasion to consider this broad question as petitioner is not entitled to

raise it. When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction" (303 U.S. at 6). See, also, *Carter* v. *Texas*, 305 U.S. 557, dismissing appeal from 135 Tex. Crim. Rep. 457, 116 S.W. 2d 371; *Ogden* v. *United States*, 303 F. 2d 724, 731 (C.A. 9); *Humble Oil & Refining Co.* v. *United States*, 198 F. 2d 753, 756 (C.A. 10), certiorari denied, 344 U.S. 909; *United States* v. *Barra*, 149 F. 2d 489, 490 (C.A. 2); *Boehm* v. *United States*, 123 F. 2d 791 (C.A. 8), certiorari denied, 315 U.S. 800; *Hills* v. *United States*, 97 F. 2d 710, 713, (C.A. 9); cf. *United States* v. *Williams*, 341 U.S. 58, 67–69.

The principle applied in these cases, we submit, is equally applicable here. Indeed, this case is stronger than any of the cited cases, for if the defendants in *Kapp* were precluded from relying on the invalidity of a statute *which this Court had previously held unconstitutional*, surely the present petitioners may not overturn their convictions by attacking a statute which this Court has previously upheld. Falsification and trickery—like force or violence—are not legitimate means of testing the constitutionality of a statute. Quite apart from the validity of any particular legislation, there is an overriding interest in preventing the use of deceit to undermine the government's operations or circumvent its laws. Of course, affected persons are entitled to question the validity of acts of Congress, but their attacks must be made in an orderly

fashion and in accordance with law. Petitioners might have laid a foundation for a challenge to Section 9(h) in this case by filing true affidavits; instead, they sought to thwart the provision and frustrate its purposes by fraudulent means. Such practices should not be condoned, especially where, as here, the statute at which they were directed had been upheld—after a legal and orderly challenge—by this Court.

Although the validity of Section 9(h) is not a proper issue in this case, we briefly point out that, contrary to petitioners' contention, neither *United States* v. *Brown*, 381 U.S. 437, nor *Aptheker* v. *Secretary of State*, 378 U.S. 500, overrules the decision in *Douds*, in which Section 9(h) was upheld. Unlike the statute found unconstitutionally broad in *Aptheker*, Section 9(h) neither "sweeps within its prohibition both knowing and unknowing members"[1] (378 U.S. at 510) nor excludes "other considerations which might more closely relate the [sanction] to the stated purpose of the legislation" (378 U.S. at 511).[1] And

[1] Whereas the passport provision of the Subversive Activities Control Act of 1950, Section 6, 50 U.S.C. 785, covered persons who did not know that the group to which they belonged was a Communist-action organization, Section 9(h) applies only to members of the Communist Party itself. And while the passport provision effectively prohibited all foreign travel, regardless of the purpose of any trip or the sensitivity of the area to which travel was sought, Section 9(h) is confined to a much more particularized kind of conduct. Neither union membership nor employment in other than sensitive positions of union leadership is affected. Moreover, considering the manner in which union officers are chosen, in contrast with the way passports are granted, there was no less restrictive means for Congress to effect the concededly legitimate purpose of Section 9(h).

this Court expressly distinguished *Douds* in the *Brown* case on the ground that the statute involved there, "unlike § 9(h), disqualifies from the holding of union office not only present members of the Communist Party, but also anyone who has within the past five years been a member of the Party" (381 U.S. at 458). See also *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1, 86–87.

3. Petitioners also present a number of contentions relating to alleged errors at their trial. All of these were, we submit, fully considered and properly rejected by the court of appeals, and none warrants further review by this Court.

a. Petitioners first attack the trial court's denial of their motion for the production, or *in camera* inspection, of the minutes of the grand jury testimony of three government witnesses (Pet. 12–16). But as this Court recently held in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400, defendants are entitled to the production of grand jury testimony only when they have shown that "'a particularized need' exists for the minutes which outweighs the policy of secrecy." Whether a particularized need has been shown depends upon the nature of the charge, the nature and significance of the witness' trial testimony, the existence of pretrial statements available to defense counsel—in short, on whether an appraisal of the witness' testimony within the framework of the entire case indicates that further probing of the direct testimony is necessary. Cf. *United States* v. *Boyance*, 329 F. 2d 372, 377 (C.A. 3), certiorari denied *sub*

nom. Feldman v. *United States*, 377 U.S. 965; *Gordan* v. *United States*, 299 F. 2d 117 (C.A. D.C.); *Travis* v. *United States*, 269 F. 2d 928, 945 (C.A. 10), reversed on other grounds, 364 U.S. 631. As petitioners appear to concede (see Pet. 14), no such need was shown in this case. As the court of appeals correctly pointed out, "the witnesses were thoroughly and competently cross-examined on numerous other judicial and extra-judicial statements without manifest inconsistency * * *" (Pet. App. 13a).

It is implicit in *Pittsburgh Plate Glass Co.* (see 360 U.S. at 398) that where, as here, no particularized need for the grand jury testimony of a witness is shown, the trial judge is not required to examine the testimony merely to determine whether there might be some inconsistency with the witness' testimony at the trial. See, *e.g.*, *Jackson* v. *United States*, 297 F. 2d 195 (C.A. D.C.); *Parr* v. *United States*, 265 F. 2d 894 (C.A. 5), reversed on other grounds, 363 U.S. 370; *Hance* v. *United States*, 299 F. 2d 389, 398 (C.A. 8); *Bary* v. *United States*, 292 F. 2d 53 (C.A. 10). While *in camera* examinations of grand jury testimony are made upon request as a matter of course in the Second Circuit (*e.g.*, *United States* v. *Giampa*, 290 F. 2d 83, 85), that variation from the practice in the other circuits has not been deemed by this Court a matter requiring review, where on the facts no "particularized need" for inspection was shown. *Berry* v. *United States*, 295 F. 2d 192 (C.A. 8), certiorari denied, 368 U.S. 955; *Brilliant* v. *United States*, 297 F. 2d 385 (C.A. 8), certiorari denied, 369 U.S. 871; *United States* v. *Boyance*, 329 F. 2d 372 (C.A. 3),

certiorari denied *sub nom. Feldman* v. *United States*, 377 U.S. 965; *United States* v. *Bertucci*, 333 F. 2d 292 (C.A. 3), certiorari denied *sub nom. Doherty* v. *United States*, 379 U.S. 839. There is similarly no occasion for review in this case.

b. Petitioners also seek review of various rulings of the trial court, sustained by the court of appeals, relating to the admission of evidence at the trial (Pet. 16–20, 24–28). For the most part, their contentions call for an evaluation of the trial court's exercise of discretion in light of the record as a whole. The court below undertook this evaluation and correctly, we submit, found no error prejudicial to petitioners' substantial rights.[8]

Petitioners complain of the exclusion of two "business records": petitioner Dichter's expense vouchers, offered to impeach witness Locke's testimony that Dichter took over the management of Mine-Mill's Cleveland office after the ouster of Eckert and had staff meetings "nearly every morning" during April and May of 1948,[9] and a list compiled by the NLRB

[8] It should be noted that the court below reversed petitioners' original convictions solely because of the introduction of inadmissible evidence (Pet. App. 28a). There is no reason to believe that petitioners' contentions were not adequately considered below.

[9] The vouchers offered by petitioners showed that Dichter was in Cleveland on April 8, 1948, and thus supported the significant part of Locke's testimony that Dichter participated with petitioner Travis and Party functionaries who did not belong to Mine-Mill in expelling Eckert from union leadership because of Eckert's urging—contrary to the position of the Communist Party at that time—that Mine-Mill officers comply with Section 9(h) (R. 74–77).

showing when various labor unions first complied with Section 9(h). Exclusion of the vouchers, which related only to a collateral matter (see Wigmore, *Evidence*, (3d ed.) §§ 1001–1003, 1021), and of the proffered list, the relevance of which was not adequately established,[10] plainly did not prejudice the defense.

Petitioners also contend that the court erroneously permitted the testimony given at the first trial by William Mason, who died before the second trial (R. 129–130), to be read to the jury under the procedure approved by this Court in *Mattox* v. *United States*, 156 U.S. 237. Petitioners assert that they did not have a full opportunity to cross-examine Mason at the first trial because of the allegedly improper withholding of certain "statements", restrictions on cross-examination, and the failure of the Court to give petitioners access to Mason's grand jury testimony.[11]

As this Court has made clear, "[f]inal decision as to production [of statements under 18 U.S.C. 3500] must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the District Judge * * * subject to the appropriately limited review of appellate courts." *Palermo* v. *United States*, 360 U.S. 343, 353. The trial court's findings as to whether particular documents are "statements" pre-

[10] The list showed only that 108 unions filed affidavits in 1947, 73 in 1948, 30 in 1949, and 29 in 1950. There was no showing that any of these unions were, as petitioners now assert (Pet. 20), "similarly situated" with Mine-Mill. Why any of the listed unions filed affidavits when they did is purely a matter of conjecture, and the exhibit offered by petitioners was wholly devoid of probative value.

[11] The latter contention is discussed *supra*, at pp. 14–16.

ducible under the Jencks Act may not be disturbed unless "clearly erroneous." *Campbell* v. *United States*, 373 U.S. 487, 493. In this case, both the trial court and the court of appeals found that all of Mason's producible "statements" had been delivered to the defense at the first trial and that the additional documents sought by petitioners at the second trial were not "statements" within the meaning of Section 3500.

These findings were arrived at after careful consideration of the available evidence and are fully supported in the record. Contrary to petitioners' representation (Pet. 28), the trial court and counsel conducted a thorough *voir dire* examination of the F.B.I. agent (R. 140–148) and several government attorneys who had interviewed Mason. These examinations revealed that, except for those documents which were in fact produced, the only notes taken by the interviewers were selective, abbreviated and incomplete, and the memoranda involved were prepared both from the notes and the interviewers' memory—usually a relatively long time after the interview. Contrary to petitioners' assertions (Pet. 27), the evidence as to the only two documents specifically mentioned in the petition plainly indicates that they were not producible under Section 3500. Worthington's memorandum was prepared, a month after his interview with Mason, on the basis of interview notes as well as Worthington's recollections. Neither the interview notes nor the memorandum was a substantially verbatim account of Mason's testimony and neither

was shown to Mason or approved by him in any way (R. 182–191, 214–216). Nor was Crandall's outline "checked over" with Mason, or even shown to him. Indeed, it was prepared—from the transcript of Mason's testimony in another trial—*before* Crandall's interview with Mason (R. 173, 180, 182, 215). The only interviewer not examined on *voir dire* at the second trial was an NLRB attorney, stationed in Washington, who had interviewed Mason in 1954 preparatory to an NLRB hearing. But the trial court found that the government made a satisfactory showing that this interview did not result in any producible statement other than the affidavit which, contrary to petitioners' allegation (Pet. 26), was made available to the defense at the first trial (R. 216; see also R. 210–211).

Of course Mason could not have been examined on *voir dire* at the second trial. But the critical factor under the *Mattox* rule is whether there was opportunity for such an examination at the first trial. Plainly there was such an opportunity. Having failed to avail themselves of it then, petitioners may not now claim prejudice. See *Ogden* v. *United States*, 303 F. 2d 724 (C.A. 9). It should be noted that petitioners' counsel had examined Mason on *voir dire* on the subject of pretrial statements at the trial of a related case involving petitioner Travis (R. 149–150).[12]

[12] Petitioners' contention that they were unduly restricted in cross-examining Mason at the first trial is without merit. They complain of not being allowed to impeach his "general credibility by showing that he, as a naturalized citizen and admitted ex-Communist, feared denaturalization and deportation and was therefore susceptible to pressures or suggestions that he give

c. Petitioners raise objections to the portion of the trial court's charge relating to co-conspirators' declarations (Pet. 20–23). The trial court gave the standard instructions on this matter (see Mathes, *Some Suggested Forms for Use in Criminal Cases*, 20 F.R.D. 231, 269–270 [Form 43C–3]), which, as the court below held (Pet. App. 8a–10a), fully informed the jurors as to the proper manner in which to consider such declarations.[13] The court properly rejected petitioners' request that it specify which declarations were, in fact, in furtherance of the conspiracy (R. 667, 1030–1031). To comply with this request, the court would have had to determine not only whether each statement was made during the pendency of the conspiracy,[14] but whether it was made with the intent

testimony favorable to the government" (Pet. 27). This same contention was raised and rejected by the court of appeals in *Travis* v. *United States*, 269 F. 2d 928, 939–940 (C.A. 10), reversed on other grounds, 364 U.S. 631. There the court correctly found that the attempted line of cross-examination was not geared to a reasonable showing of bias or undue influence. Particularly in light of the evidence that Mason had admitted his past Communist affiliations to the Immigration and Naturalization Service prior to his naturalization, the court aptly observed: "The inference that the witness Mason was coercively influenced to testify by a power over him held by immigration officials requires imagination to be applied in disparagement of facts appearing in the record". For a full view of the facts as to Mason's cross-examination, see the record in this Court in Nos. 3, 10 and 71, 1960 Term, pp. 737–744, and the brief for the United States in that case, pp. 61–64.

[13] The correctness of this instruction—set forth at R. 1013—is borne out by a long line of decisions in this Court. See Annotation, 1 L. Ed. 2d 1780, 1782 n. 20.

[14] The jury was carefully instructed as to the dates on which the conspiracy began and ended (R. 1008, 1012, 1024), and

to advance the conspiracy's objects. See *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 985 (1959). The determination of intent is peculiarly within the jury's province.[20]

Likewise without merit is petitioners' contention (Pet. 23–24) that the trial court improperly refused to instruct as to accomplice testimony. With the possible exception of witness Lawrence, who was indicted with petitioners and pleaded *nolo contendere*, it is questionable whether any of the witnesses may properly be considered petitioners' "accomplice". In any event, the trial court was not required explicitly to caution the jury against too much reliance upon the testimony of accomplices. See *Krulewitch* v. *United*

---

there is no reason to believe that it considered declarations made before June 15, 1949, to be in furtherance of the conspiracy. There were no post-conspiracy statements offered. The decisions of this Court cited by petitioner (Pet. 22) hold only that statements made after a conspiracy has terminated are not admissible against all conspirators and are wholly inapposite here.

[20] Petitioners also allege (Pet. 22–23) that the court improperly allowed the jury to consider statements of Communist functionaries not shown to be co-conspirators as proof that the defendants were members of the conspiracy. But the cited testimony—some of which is plainly of no significance (*e.g.*, Bary, R. 239–240; Johnson, R. 447; Hillman, R. 449)—was admitted under carefully drawn limiting instructions and was not admitted to show that any defendant was a member of the conspiracy. The jury was properly instructed that "participation of a defendant in a conspiracy must be determined from evidence relating to [his] own acts, his own declarations and his own conduct in connection with the actions and conduct of others" (R. 1013; cf. 20 F.R.D. at 269). There is no reason to believe that the jury did not properly adhere to this instruction.

States, 336 U.S. 440, 454 (Jackson, J., concurring); *Caminetti* v. *United States*, 242 U.S. 470, 495. Moreover, as the court of appeals found (Pet. App. 19a-20a), the trial court's instructions (Pet. App. 20a, n. 8) adequately cautioned the jury concerning the weight they should give to the testimony of the three witnesses who petitioners claim were accomplices.[16]

Nor is there any substance in petitioners' contention (Pet. 10–11 & n. 9, 30–31 & n. 34) that the trial court omitted an essential element of the offense in its charge to the jury. This objection was not made in the trial court (see R. 1030–1035; 1118–1126) and therefore may not be considered here. Moreover, the fragment of the charge relied on by petitioners is taken out of context. The court read the full indictment to the jury, which, of course, revealed all the elements of the crime with which petitioners were charged (R. 1005–1008). In addition, after reading the text of 18 U.S.C. 371, the court expressly instructed that "[t]he conspiracy charged in this case is a conspiracy to defraud the United States or an agency thereof by filing false non-Communist affidavits with the National Labor Relations Board by one or more of the defendants in this case * * *" (R. 1010).

4. Finally, petitioners attack the sufficiency of the evidence that they were engaged in concerted, rather than merely unilateral, unlawful activities. This is-

[16] The instruction referred to "informers" and "former members of the Communist Party." Fikes was a paid informer and Gardner and Lawrence were former Party members. Gardner also had given information to the government, although it was not shown whether he was paid for it.

sue was resolved adversely to petitioners' contentions in two decisions of the district court and jury and two decisions of the court of appeals.[17] There is no occasion for further review. See *United States* v. *Johnson*, 319 U.S. 503, 518; *Delaney* v. *United States*, 263 U.S. 586.

As we have noted (Statement, *supra*, pp. 3–4), there is no dispute that petitioners were both Communist Party members and Mine-Mill officials, that their conduct as union officials in relation to Section 9(h) conformed to the policy of the Party, and that that policy changed in 1949 from one of non-compliance with Section 9(h) to "compliance" by having union officials sign non-communist affidavits, some of which were false.[18] Petitioners contend that the government merely established "parallelism" or perhaps two separate conspiracies, but there was ample evidence of concerted action by all petitioners toward the goal of the conspiracy charged in the indictment.

---

[17] As the court below noted (Pet. App. 10a), the evidence in both trials was substantially the same.

[18] Four petitioners were union officers and signed affidavits during the relevant period: Dichter (first affidavit filed in February 1955; did investigatory work for the Party in March 1955, R. 577); Dennis (filed affidavits from 1949 to 1956; did various jobs for the Party during that period, R. 551–554, 556–557, 559–560); Travis (filed affidavits between 1949 and 1954; before and during that time he was concededly a member of the Communist Party, R. 306–309, 317–318, 558); and Wilson (filed affidavits from 1949 through 1953; before and during that time he indicated that his "compliance" with Section 9(h) was feigned and he helped another union official who was a Party member similarly to feign resignation from the Party before filing an affidavit, R. 431–434, 438, 469, 475).

"Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *Glasser* v. *United States*, 315 U.S. 60, 80; *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664. Here, the jury had evidence of a prolonged course of conduct by petitioners and others to maintain Communist Party control of Mine-Mill. When Communist control was jeopardized by Section 9(h), a decision was taken by the Party leadership to continue this control by means of fraudulent "compliance" with the Act. It was necessary to the effectuation of this policy that all, or at least most, of Mine-Mill's Communist officers file false affidavits. And in fact—with a uniformity that cannot be attributed to coincidence in light of this background—Mine-Mill's Communist officers, including four petitioners, signed false affidavits, subjecting themselves to the risk of criminal prosecution.

The evidence showed continuing contacts among the petitioners and petitioners' continuing relationship to both Mine-Mill and the Communist Party. Petitioners repeatedly subjected themselves to Party discipline (*e.g.*, Travis, R. 558, 573; Wilson, R. 320, 441, 562) and sought, often successfully, to impose such discipline on others (*e.g.*, Travis, Dichter, Dennis, R. 77, 81; Skinner, Dichter, Sanderson, Travis, R. 569, 572, 577–578). The evidence established that all were intimately involved with the threat posed by Section 9(h) to Communist domination of Mine-Mill and that all were aware of, and contributed to the effectuation of, the

policy adopted in response to that threat.[19] As the court below correctly ruled, there was more than sufficient "competent and substantial evidence before the jury fairly tending to sustain the verdict." See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 254.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

GEORGE B. SEARLS,
Attorney.

OCTOBER 1965.

---

[19] The petition singles out petitioner Dichter as one against whom the evidence was particularly insufficient (Pet. 31). But Dichter's role in translating Party policy on Section 9(h) into union policy was far from insignificant (See R. 77–79, 236–237, 251–254). Even if he had not joined the conspiracy until he became a union officer and filed a false affidavit in 1955 (see n. 18, *supra*), he would still properly have been chargeable as a co-conspirator with the other petitioners. See *Mendelson* v. *United States*, 58 F. 2d 532 (C.A.D.C.). The cases cited by petitioners (Pet. 31) in no way support the proposition they are claimed to espouse. Indeed, they all expressly recognize that "[a] single act may be enough to draw a defendant within the ambit of a conspiracy." *United States* v. *Bentvena*, 319 F. 2d 916, 927 (C.A. 2). There was ample evidence to show that Dichter—like all the other petitioners—worked for the maintenance of Communist control over Mine-Mill, a goal which logically required, and in fact was pursued by, concerted efforts fraudulently to obtain the services of the NLRB.

U.S. GOVERNMENT PRINTING OFFICE 1965

FREE COPY

FILED
OCT 2 9 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 502

RAYMOND DENNIS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO GOVERNMENT'S OPPOSITION

Taylor, Scoll, Ferencz & Simon,
200 Park Avenue,
New York, N. Y. 10017,

Nathan Witt,
P. O. Box 156,
New York, N. Y. 10023,

George J. Francis,
670 Capitol Life Center,
Denver, Colorado 80203,

Attorneys for Petitioners.

Telford Taylor,
of Counsel.

INDEX

	PAGE
1. Statutory Insufficiency of the Indictment	2
2. Constitutional Insufficiency of the Indictment	3
3. Production of Grand Jury Minutes	4
4. Exclusion of Business Records	5
5. "Vicarious Admissions" and "Furtherance"	6
6. Admission of Record of Deceased Witness' Testimony at Prior Trial	7
7. Insufficiency of the Evidence	8
Conclusion	9

Citations

CASES:

Aptheker v. Secretary of State, 378 U. S. 500	1, 3
Bary v. United States, 292 F. 2d 53	7
Baxa v. United States, 381 U. S. 353	6, 7
Bridges v. United States, 348 U. S. 209	2, 3
Brotherhood of Carpenters v. United States, 330 U. S. 395	3
Campbell v. United States, 365 U. S. 85; 373 U. S. 487	7
Ingram v. United States, 360 U. S. 672	8
Kay v. United States, 303 U. S. 1	3, 4
Parr v. United States, 363 U. S. 376	5
Pittsburgh Plate Glass Co. v. United States, 360 U. S. 395	4
Travis v. United States, 364 U. S. 631	5

PAGE

United States v. Brown, 381 U. S. 437 ..... 1, 3
United States v. Grainger, 346 U. S. 235 2
United States v. Kapp, 302 U. S. 214 ..... 3, 4
United States v. Lurie, 222 F. 2d 11 2
United States v. Raub, 177 F. 2d 312 3

STATUTES:

18 U. S. C. 371 ..... 2, 3
18 U. S. C. 1001 2
18 U. S. C. 3500 7
29 U. S. C. 159(h) (Sec. 9(h) of Taft-Hartley) ... 3

MISCELLANEOUS:

Developments in the Law-Criminal Conspiracy, 72 Harv. L. Rev. 920 (1959) 6

IN THE

Supreme Court of the United States

October Term, 1965

No. 502

RAYMOND DENNIS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO GOVERNMENT'S OPPOSITION

Nothing could better demonstrate the need for review of this case as a conspiracy case than the fact that the government's own brief, in stating the evidence deemed sufficient to connect an individual defendant with the alleged conspiracy, relies (without disclosing such reliance) on statements made outside the presence of the defendant sought to be implicated thereby.[1]

Nothing could better demonstrate the need for review of the constitutional issue in this case, if it be reached, than the fact that the government, in seeking to avoid the constitutional questions so plainly raised by *United States v. Archie Brown*, 381 U. S. 437, and *Aptheker v. Secretary of State*, 378 U. S. 500, takes the position that anyone charged with making a false statement to the government may not question the validity of the statute or other authority under which the statement is required to be made—

---

[1] Government's brief in opposition (hereinafter cited as Opp. 4-5) (Sanderson); *infra*, pp. 8-9. The petition for certiorari is hereinafter cited as "Pet."

a position the obvious and alarming implications of which the government leaves unexplored and unmentioned.[2]

1. *Statutory Insufficiency of the Indictment* (Opp. 6-10). With respect to the statutory insufficiency of the indictment, the fallacy of the government's position is illustrated by its describing as an "acknowledgment" (Opp. 6) petitioners' statement (Pet. 8) that "the indictment explicitly charges a conspiracy to defraud the United States . . .". This misses the whole point, for the teaching of *Bridges* v. *United States*, 346 U. S. 209, is that even though an indictment "explicitly charges" a conspiracy to defraud the United States, the charge is insufficient if the language "merely cloaks" a factual charge of conspiring to commit an offense of which fraud is not an essential element (Pet. 9).

The government (Opp. 8-9) lays great stress on the "broad reach" of the Federal Conspiracy Statute (18 U. S. C. 371)—a breath which petitioners in no way challenge. The sweep of the injunction against conspiring to defraud the United States may be as broad as you please, but still the indictment must factually charge that fraud was an essential element of the conspiracy's object.[3]

The present indictment, like that in the *Bridges* case, fails to do this. No doubt the government has a "legitimate interest in having its laws operate . . . on the basis of truthful rather than falsified information" (Opp. 9). But if obstructing that interest, without more (*i.e.*, the essential

---

[2] Opp. 10-13; *infra*, pp. 3-4.

[3] Refusal to recognize this basic rule, as established by the *Bridges* case, accounts for the government's bland assertion (Opp. 8, n. 2), that *United States* v. *Grainger*, 346 U. S. 235, "has no bearing on the present case", although the *Grainger* case embodies reasoned dictum (346 U. S. at 241-3) that fraud is not an essential element of the statute (18 U. S. C. 1001) petitioners are charged with conspiring to violate, as was expressly held in *United States* v. *Luric*, 222 F. 2d 11 (CA 7), not mentioned by the government.

element of fraud), were enough to ground an indictment under the fraud clause of 18 U. S. C. 371, the *Bridges* case should have been decided otherwise.[4]

Regarding the trial court's erroneous failure to charge the jury that a finding of fraudulent intent was an essential element of the offense (Pet. 10-11 and 31), the government now contends (Opp. 22) that this objection "was not made in the Trial Court . . . and therefore may not be considered here". This suggestion is amazing, inasmuch as petitioners explicitly and unsuccessfully requested the judge to charge that no defendant could be convicted absent a finding that he "conspired with other defendants to bring about the filing of such false affidavits with intent to defraud the United States" (No. 7, R. 1121).[5]

2. *Constitutional Insufficiency of the Indictment* (Opp. 10-14). Seeking to avoid the constitutional problems underlined by the *Archie Brown* and *Aptheker* cases, the government now raises a new contention that petitioners lack standing to challenge the constitutionality of Section 9(h) of the Taft-Hartley Law, on the ground that one charged with making false statements to the government cannot challenge the validity of the authority pursuant to which the statement is required (Opp. 10-13). This argument is quite without merit. In the two cases chiefly relied on by the government—*United States* v. *Kapp*, 302 U. S. 214, and *Kay* v. *United States*, 303 U. S. 1—the defendants had

[4] The government's arguments on the statutory sufficiency of the indictment are wholly formal, and do not touch the practical difference between conspiracies to defraud and conspiracies to commit offenses, remarked in the petition (Pet. 10).

[5] Even had this charge not been requested and denied, reversal would be required inasmuch as the judge was bound to charge the jury with respect to the essential elements of the offense, and a failure so to do is plain and prejudicial error which an appellate court should notice. *Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 411-12; *United States* v. *Raub*, 177 F. 2d 312 (CA 7).

made false statements for the purpose of obtaining financial benefits from the government—benefit payments under the Agricultural Adjustment Act in the *Kapp* case, a loan from the Home Owners Loan Corporation in the *Kay* case. But in the present case, although the fruits of the alleged conspiracy are described in the indictment (R. 4) as "services and facilities of the National Labor Relations Board", it is clear that these are in no sense "benefits" or "bounties". Rather they were incidents of a regulatory scheme which imposed restrictions on those seeking to use the Board.

The principles of the *Kapp* and *Kay* cases have no application where the defendant is seeking no special statutory benefit, but is engaging in conduct or exercising rights which would be open to him in the absence of the unconstitutional statute under which the allegedly false statement is required. If election officials unlawfully require voter registrants to disclose their race, educational attainments, or other matters, could persons prosecuted for false answers not challenge the validity of the questions? If regular income tax exemptions were made conditional upon a statement that the signatory was not of a particular religious persuasion, could he be prosecuted for making a false response? It is not enough to say that unauthorized questions need not be answered at all, for many would answer out of ignorance or fear, or under official pressure.

The implications of the government's argument are so alarming that it is difficult to believe that the position taken in its brief embodies the considered view of the Department of Justice. We respectfully suggest that it should be given no trace of judicial countenance.

3. *Production of Grand Jury Minutes* (Opp. 14-16). The government's entire treatment of *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, is bottomed on the false proposition that it applied the requirement of "particularized need" to the production of grand jury

minutes to the judge *in camera*, when in fact it applied the requirement only to production of the minutes directly to the defense. The opinion leaves no room for such misinterpretation, as it explicitly left open the basis upon which a request for examination of the minutes *in camera* should be treated (360 U. S. at 401).

With respect to the considerations affecting certiorari, the government takes the remarkable position (Opp. 15-16) that a mounting divergence of practice among the several circuits (Pet. 14-16) is unworthy of this Court's attention. In fact, at least twice before the Court has granted certiorari in cases raising this question and has heard argument on it. *Travis* v. *United States*, 364 U. S. 631, and *Parr* v. *United States*, 363 U. S. 370, both decided on other grounds.

In any event, abundant "particularized need" was shown in this case, and the government makes no effort to show the contrary other than by the assertion (Opp. 15) that "petitioners appear to concede" a lack of such a showing—an utterly baffling statement in view of petitioners' detailed description and argument in support of the showing (Pet. 15, n. 16).

4. *Exclusion of Business Records* (Opp. 16-17). The government does not argue that the Dichter expense vouchers (Pet. 16-19) were properly excluded, and restricts itself to the *ex cathedra statement* (Opp. 17) that the exclusion "did not prejudice the defense".[6] This disparagement of the significance of the vouchers rings false, when compared with the emphasis placed by prosecution counsel, addressing the jury, on the importance of the prosecution testimony of Locke, which the vouchers would have shown to be false (Pet. 19).

---

[6] The government's other comment that the vouchers related to a "collateral matter" (Opp. 17) is obscure and, in any event, quite incorrect, inasmuch as the evidence embodied in the vouchers directly controverted direct and significant testimony of the prosecution witness Locke (Pet. 16-19).

5. *"Vicarious Admissions" and "Furtherance"* (Opp. 20-22). The government takes the position that, in a conspiracy trial, it is for the jury and not the trial judge, to determine whether or not particular "vicarious admissions" were made in "furtherance" of the conspiracy (Opp. 20). No authority is cited [7] for this remarkable notion, for the very good reason that there is none. The rule has been universal that this is a question for the trial judge, and the government found no recourse except to shut its eyes to the contrary authorities (Pet. 22). Furthermore, the rule is sound; however difficult it may be for the trial judge to rule on the point in a case such as the present one, where the government's evidence is comprised of numerous such declarations, it would be far more difficult—indeed, quite impossible—for the jury to perform this task.

What is most remarkable is that the government took a contrary (and the proper) position on this very issue in its memorandum in a case decided at the last term of this Court. *Baxa* v. *United States*, 381 U. S. 353. There, one of the co-conspirator defendants had made admissions which, as here, the trial court allowed the jury to consider against the other defendants. Conceding that these admissions were not made in furtherance of the conspiracy, [8] the government agreed that the testimony was "inadmissable" against the other defendants, who were therefore entitled to have the jury instructed accordingly. See the Memo-

[7] There is a citation to a page from a law review article (Opp. 21), but the article in question contains nothing that can possibly be construed as supporting the government's argument; indeed, its implications are strongly to the contrary. *Developments in the Law-Criminal Conspiracy*, 72 Harv. L. Rev. 920, 985 (1959).

[8] The government said in its memorandum (pp. 8-9) that it was "probable" that the conspiracy had come to an end before the admissions were made, but agreed that even if this were not so and the statements were made during the conspiracy's pendency, they were plainly not in "furtherance" of the criminal enterprise.

randum for the United States in No. 957, October Term, 1964, *Baxa* v. *United States*, at pp. 8-9.

On this basis the government confessed error and invited reversal in the *Baxa* case, and this Court reversed on the same ground. The decision is directly applicable to the present case, and one can only wonder that it is not even mentioned in the Government's brief (Opp. 20-21).

6. *Admission of Record of Deceased Witness' Testimony at Prior Trial* (Opp. 17-19). The government's justification for the receipt in evidence of the record of Mason's testimony at the first trial is based on the false proposition that because Mason was not examined on *voir dire* under 18 U. S. C. 3500 at the first trial, the defense cannot now complain that he was unavailable for *voir dire* at the second trial (Opp. 19). The proposition is false because the government appears to be unaware of the purpose of *voir dire* under Section 3500.

At the first trial, the government represented that there were no documents relating to Mason's testimony which raised an issue of producibility under Section 3500 (Pet. 25 and R. 345-46). On the basis of that representation (which the defense was in no position to challenge), there was no reason or basis for conducting a *voir dire* examination of Mason.

At the second trial, and because of the intervening decisions in *Campbell* v. *United States*, 365 U. S. 85 and 373 U. S. 487, and *Bary* v. *United States*, 292 F. 2d 53 (C. A. 10), the prosecution brought forth numerous documents which raised an issue of producibility under Section 3500. But those issues could not be satisfactorily resolved at the second trial, because Mason was no longer available for *voir dire* examination (Pet. 25-26).

The government never faces up to this consideration, and therefore everything it says on this point is wide of the

mark. A similar flaw vitiates its justification of the trial court's failure to call the government attorney Foley (then stationed in Washington), by arguing that the statement resulting from his interview with Mason was not "producible" (Opp. 19). The question of its producibility could not be resolved without *voir dire* examinations of Foley and Mason, but the former was not called because he was too far away, and the latter was dead (Pet. 26-27).*

7. *Insufficiency of the Evidence* (Opp. 2-6 and 22-25). The essential difficulty with the government's treatment of the evidence is its failure to take account of the evidentiary rules applicable to conspiracy trials. It is useless for this Court to lay down rules such as those enunciated in *Ingram* v. *United States*, 360 U. S. 672 (Pet. 30), if trial courts refuse to embody its teaching in jury instructions (Pet. 31) and government briefs treat those teachings only with silence.

How easy it is for courts and prosecutors to ignore or overlook supposedly basic safeguards is amply demonstrated by the government's treatment of the case against the petitioner Sanderson. Thus it is stated (Opp. 4) that "all six petitioners [thus including Sanderson] attended Communist Party meetings" in the year 1948. The only record citation given by the government affecting Sanderson is to an account of a Communist meeting at the petitioner Travis' home (R. 87). But the only basis for an inference that there was a Communist meeting is a statement said to have been made by Travis (R. 86) when Sanderson was not present.

Subsequently the government (Opp. 5) declares that "Sanderson was given the job of conducting the activities of Communists on Mine-Mill's staff, including the collection

* The affidavit referred to in the government's brief (Opp. 19) is *not* a statement resulting from Foley's interview with Mason (R. 208-14 and Pet. 26-27).

of Party dues (R. 472; see also R. 304-05)." The first reference, again, is to a conversation at which Sanderson was not present (R. 472); the second is to a Mine-Mill document imposing certain duties on Sanderson, which of course says not a word about Communists or their Party dues or activities (R. 304).

CONCLUSION

For the reasons sets forth in the petition and in this reply the petition should be granted.

Respectfully submitted,

TAYLOR, SCOLL, FERENCZ & SIMON,
200 Park Avenue,
New York, N. Y. 10017,

NATHAN WITT,
P. O. Box 156,
New York, N. Y. 10023,

GEORGE J. FRANCIS,
678 Capitol Life Center,
Denver, Colorado 80203,

Attorneys for Petitioners.

TELFORD TAYLOR,
of Counsel.

FILE COPY

FILED
MAR 10 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 502

RAYMOND DENNIS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE PETITIONERS

Taylor, Scoll, Ference & Simon,
200 Park Avenue,
New York, N. Y. 10017.

Nathan Witt,
P. O. Box 156,
New York, N. Y. 10023.

George J. Francis,
670 Capitol Life Center,
Denver, Colorado 80203.

Attorneys for Petitioners.

Telford Taylor,
of Counsel.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Summary of Argument	7
ARGUMENT:	
I. The Indictment Fails to State the Offense of Conspiracy to Defraud the United States	10
A. The Indictment Charges Only a Conspiracy to Commit an Offense of Which Fraud Is Not an Element	11
B. The Indictment Fails to Charge Conduct Which in Fact Involves Fraud	17
II. Section 9(h) of the Taft-Hartley Act Is Unconstitutional	19
A. Section 9(h) Is Unconstitutional as a Bill of Attainder	20
B. Section 9(h) Is Unconstitutional Under the First and Fifth Amendments	29
III. Petitioners' Motions for the Production of the Grand Jury Testimony of Key Prosecution Witnesses Were Erroneously Denied	36
A. Petitioners Made the Showing of "Particularized Need" Required for the Production of Grand Jury Testimony Directly to the Defense	38
B. Even if Not Producible Directly to the Defense, the Grand Jury Testimony Should Have Been Produced for *In Camera* Inspection by the Trial Court	47

PAGE

C. The "Particularized Need" Requirement of *Pittsburgh Plate Glass* Should Be Reconsidered 50

CONCLUSION 52

APPENDIX 1a

Citations

CASES:

Allis-Chalmers Manufacturing Co. v. City of Fort Pierce, 323 F. 2d 233 51

Amalgamated Meat Cutters v. National Labor Relations Board, 352 U. S. 153 ..... 8, 18, 19

American Communications Association v. Douds, 339 U. S. 382 ..... 2, 8, 21, 22, 24, 28, 30, 34, 35

Aptheker v. Secretary of State, 378 U. S. 500 ..... 8, 20, 30, 31, 33, 34, 35

Atlantic City Electric Company, et al. v. A. B. Chance Company, et al., 313 F. 2d 431 51

Bary v. United States, 292 F. 2d 53 ..... 37, 50

Baxa v. United States, 381 U. S. 353 4

Bergen v. United States, 145 F. 2d 181 16

Berger v. United States, 295 U. S. 78 51

Berry v. United States, 295 F. 2d 192 48

Board of Governors v. Agnew, 329 U. S. 441 25

Bolling v. Sharpe, 347 U. S. 497 27

Bridges v. United States, 346 U. S. 209 ..... 3, 7, 11, 12, 13, 14, 15, 16, 17

Brilliant v. United States, 297 F. 2d 385 48

Brown v. United States, 334 F. 2d 488 ..... 29, 31, 33

Commonwealth Edison et al. v. Allis-Chalmers Manufacturing Co. et al., 211 F. Supp. 729 51

Communist Party v. Subversive Activities Control Board, 367 U. S. 1 ..... 24, 28

Consolidated Edison Co. v. Allis-Chalmers Mfg. Co. et al., 217 F. Supp. 36 51

Cases (Cont'd): PAGE

Cummings v. Missouri, 4 Wall. 277 ..... 8, 21, 23, 24, 25, 26, 27, 29

DeBinder v. United States, 292 F. 2d 737 50
Dennis v. United States, 302 F. 2d 5, 346 F. 2d 10 ..... 1, 4, 13, 36, 37, 41, 42, 49
Dennis v. United States, 341 U. S. 494 35
Dent v. West Virginia, 129 U. S. 114 26

Flemming v. Nestor, 363 U. S. 603 ..... 24, 25
Frank v. United States, 347 F. 2d 486 48

Gangemi v. Rosengard, 44 N. J. 166 26
Ex parte Garland, 4 Wall. 333 ..... 8, 23, 25, 27, 29
Glasser v. United States, 315 U. S. 60 17
Gordan v. United States, 299 F. 2d 117, 313 F. 2d 582 ..... 48, 50, 53

Hammerschmidt v. United States, 265 U. S. 182 ... 12, 17
Hance v. United States, 299 F. 2d 389 48
Harrell v. United States, 317 F. 2d 580 ..... 48, 50
Hawker v. New York, 170 U. S. 189 26
Hirabayashi v. United States, 320 U. S. 81 27
Hurtado v. California, 110 U. S. 516 27

Jencks v. United States, 353 U. S. 657 ..... 44, 45, 51

Kay v. United States, 303 U. S. 1 20
Kent v. Dulles, 357 U. S. 116 31

Leedom v. International Union of Mine, Mill and Smelter Workers, 352 U. S. 145 ..... 8, 11, 18, 19
Lutwak v. United States, 344 U. S. 604 18

Marzani v. United States, 168 F. 2d 133 ..... 7, 12

N.A.A.C.P. v. Button, 371 U. S. 415 34
Noto v. United States, 367 U. S. 290 ..... 28, 33

Ogden v United States, 303 F. 2d 724 50

CASES (Cont'd): PAGE

Parr v. United States, 265 F. 2d 894 ..... 49, 50
Pittsburgh Plate Glass v. United States, 360 U. S. 395 .....7, 10, 37, 38, 39, 46, 47, 48, 50, 51, 52, 53
Pittsburgh Plate Glass v. United States, 260 F. 2d 397 52
Salas v. United States, 234 Fed. 842 16
Scales v. United States, 367 U. S. 203 .....9, 30, 33
Schneiderman v. United States, 320 U. S. 118 34
Herman Schwabe, Inc. v. United Shoe Machinery Corp., 194 F. Supp. 763 51
Schware v. Board of Bar Examiners, 353 U. S. 232 34
In re Sellers, 32 F. R. D. 473 51
Shelton v. Tucker, 364 U. S. 479 ..... 9, 35
Simmons v. United States, 308 F. 2d 324 49
Skinner v. Oklahoma, 316 U. S. 535 26
Thomas v. Collins, 323 U. S. 516 34
Travis v. United States, 364 U. S. 631 6
Travis v. United States, 269 F. 2d 928 .....37, 43, 49, 50
Trop v. Dulles, 356 U. S. 86 25
United States v. Badger Paper Mills, Inc., 243 F. Supp. 443 51
United States v. Bayer, 331 U. S. 532 16
United States v. Belisle, 107 F. Supp. 283 16
United States v. Bell, 351 F. 2d 868 48
United States v. Bertucci, 333 F. 2d 292 48
United States v. Boyance, 329 F. 2d 372 48
United States v. Brown, 381 U. S. 437 ...2, 4, 8, 20, 21, 22, 24, 25, 27, 28, 29
United States v. Coduto, et al., 284 F. 2d 464 50
United States v. D'Angiolillo, 340 F. 2d 453 47
United States v. Giampa, 290 F. 2d 83 47
United States v. Gradwell, 243 U. S. 476 11
United States v. Grainger, 346 U. S. 235 ..... 7, 12
United States v. Hernandez, 282 F. 2d 71 47

Cases (Cont'd):

	PAGE
United States v. Kapp, 302 U. S. 214	20
United States v. Keegan, 331 F. 2d 257	48
United States v. Keitel, 211 U. S. 370	11, 17
United States v. Killian, 275 F. 2d 561	50
United States v. LaVallee, 344 F. 2d 313	47
United States v. Lovett, 328 U. S. 303	22, 27
United States v. Lurie, 222 F. 2d 11	7, 13, 15
United States v. McElvain, 272 U. S. 633	15
United States v. McKeever, 271 F. 2d 669	52
United States v. Micele, 327 F. 2d 222	48, 49, 50
United States v. Nasser, 301 F. 2d 243	50
United States v. Noveck, 271 U. S. 201	13
United States v. Pezzati, 160 F. Supp. 787	1, 3, 13
United States v. Procter & Gamble, 356 U. S. 677	10, 38, 51
United States v. Scharton, 285 U. S. 518	13
United States v. Smith, 335 F. 2d 898	50
United States v. Socony-Vacuum Oil Co., 310 U. S. 150	39
United States v. Spangelet, 258 F. 2d 338	47, 48, 52
United States v. Tommasello, 160 F. 2d 348	13, 16
United States v. Walsh, Fed. Cas. No. 16,636	16
United States v. Zborowski, 271 F. 2d 661	52
U. S. Industries, Inc. v. United States District Court, 345 F. 2d 18	51
Walker v. United States, 192 F. 2d 47	13, 16
Wesson v. United States, 164 F. 2d 50	13
West v. United States, 274 F. 2d 885	19
Wieman v. Updegraff, 344 U. S. 183	34
Yates v. United States, 354 U. S. 298	28

PAGE

CONSTITUTION OF THE UNITED STATES:

Art. 1, Sec. 9 ..... 8, 19, 20, 23, 29

First Amendment 8, 19, 31, 32, 34

Fifth Amendment 8, 19, 27, 31, 34

STATUTES:

Banking Act of 1933, Sec. 32, 12 U. S. C. 78 (1964 ed.) 25

Subversive Activities Control Act of 1950, Sec. 6, 50 U. S. C. 785 ..... 24, 30, 31

Wartime Suspension of Limitations Act, 18 U. S. C. 3287 ..... 14, 15

18 U. S. C. 287 12

18 U. S. C. 371 ..... 2, 3, 10, 11, 15, 16, 17, 19

18 U. S. C. 1001 ..... 2, 7, 12, 13, 16, 18, 19, 20

18 U. S. C. 3500 53

18 U. S. C. 1254(1) 1

29 U. S. C. 159(h) (Sec. 9(h) of Taft-Hartley) 2, 3, 7, 8, 9, 12, 19, 20, 21, 22, 23, 24, 28, 29, 30, 31, 34, 35

29 U. S. C. 504 ..... 22, 24, 25, 27, 28, 29, 30, 31

MISCELLANEOUS:

Congressional Globe, 39 Cong. 2d Sess. 11

Louisell, *Criminal Discovery : Dilemma Real or Apparent?*, 49 Calif. L. Rev. 56 53

Note, 72 Yale L. J. 330 (1962) 22, 27

The Supreme Court, 1964 Term, 79 Harv. L. R., 56, 123 (1965) 28

Traylor, Ground Lost and Found in Criminal Discovery, 39 N. Y. U. L. Rev. 229 53

IN THE

Supreme Court of the United States

October Term, 1965

No. 502

RAYMOND DENNIS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the court below supporting the judgment sought to be reviewed (R. 384) is reported at 346 F. 2d 10. The opinion of the court below reversing the judgments of conviction against petitioners at their first trial under the indictment (R. 1) is reported at 302 F. 2d 5. The opinion of the District Court for the District of Colorado denying the defendants' motion to dismiss the indictment (R. 8) is reported at 160 F. Supp. 787.

Jurisdiction

The judgment of the Court of Appeals was entered on April 26, 1965 (R. 404). A petition for rehearing and two supplements thereto were denied on June 28, 1965. By order of Mr. Justice White, the time for filing a petition for certiorari was extended to August 27, 1965. The petition was filed August 26, 1965, and was granted November 15, 1965, limited to the first three questions stated in the petition. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

Petitioners and others were indicted in 1956 under the fraud clause of the general conspiracy statute (18 U. S. C. 371) for conspiring to defraud the United States by causing to be filed with the National Labor Relations Board false affidavits denying membership in and affiliation with the Communist Party. The affidavits were filed pursuant to Section 9(h) of the Taft-Hartley Act, 29 U. S. C. 159(h), repealed in 1959, which made applicable to such affidavits the provisions of the so-called "false statements" statute, 18 U. S. C. 1001. The questions, as stated in the petition and quoted in the Court's order (R. 427), are:

(1) Whether the indictment states the offense of conspiracy to defraud the United States;

(2) Whether, in the comparative light of *American Communications Ass'n* v. *Douds*, 339 U. S. 382, and *United States* v. *Archie Brown*, 381 U. S. 437, Section 9(h) of the Taft-Hartley Act is constitutional; and

(3) Whether the trial court erred in denying petitioners' motions for the production, to the defense or the Court, of grand jury testimony of prosecution witnesses.

Statutes Involved

The relevant provisions of the Constitution of the United States, the federal conspiracy statute (18 U. S. C. 371), the "false statements" act (18 U. S. C. 1001), the National Labor Relations Act as amended by the Labor-Management Relations Act of 1947 (29 U. S. C. 159), and Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U. S. C. 504), are set forth in the Appendix, *infra*, pp. 1a-3a.

Statement of the Case

The one-count indictment (R. 1), returned November 16, 1956, in the United States District Court for the District of Colorado, charged the six petitioners and eight others with conspiracy to defraud the government, in violation of the fraud clause of the general conspiracy statute (18 U. S. C. 371). All of the defendants were or had been officers or staff employees of the International Union of Mine, Mill and Smelter Workers, hereinafter called "Mine-Mill".

Section 9(h) of the Taft-Hartley law provided that labor unions desiring to use the facilities of the National Labor Relations Board must establish a compliance status, for which it was required that affidavits by the union's "officers", denying membership in or affiliation with the Communist Party,[1] be on file with the Board. The gravamen of the charge in the indictment is that the accused conspired to defraud the United States by effecting Mine-Mill's compliance, through having those defendants who were Mine-Mill officers file affidavits falsely denying that they were members of or affiliated with the Communist Party. The affidavits in question were filed from 1949 to 1956.

The defendants moved to dismiss the indictment on the grounds, *inter alia*, that Section 9(h) was unconstitutional, that the prosecution was in part barred by the statute of limitations, and that the indictment failed to state the offense of conspiracy to defraud the government within the rule of *Bridges* v. *United States*, 346 U. S. 209. This motion was denied in March, 1958. *United States* v. *Pezzati*, 160 F. Supp. 787.

---

[1] Section 9(h) also required that the affidavits deny "belief in" and "support of" any organization teaching violent overthrow of the United States government, but the indictment does not involve that part of the statute, and the jury was so instructed (R. 339).

Eleven of the accused stood trial in 1959 and nine were convicted.[3] In March, 1962, the Court of Appeals reversed the judgments of conviction with instructions to dismiss the indictment as to two of the defendants. *Dennis* v. *United States*, 302 F. 2d 5. The seven remaining defendants were tried again in 1963; the jury acquitted one and convicted the six petitioners. The Court of Appeals affirmed the judgments of conviction and denied a petition for rehearing timely filed, and supplemented following the decisions of this Court in *Baxa* v. *United States*, 381 U. S. 353, decided May 24, 1965,[5] and *United States* v. *Archie Brown*, 381 U. S. 437, decided June 7, 1965.

Mine-Mill is a union operating in the non-ferrous metals field. Its compliance with the Taft-Hartley filing requirements and use of the Board's facilities are not disputed. Nor is it disputed that non-Communist affidavits were made and filed by the four petitioners who were officers of Mine-Mill during the period covered by the indictment.[6]

---

[3] Three of the 14 accused pleaded nolo contendere, and two were acquitted by direction of the trial judge at the close of the government's case.

[5] This decision related to the trial court's refusal to instruct the jury with respect to the "vicarious admissions" and the application to them of the requirement of "furtherance", specified as part of question (5) in the petition for certiorari.

[6] One of the petitioners (Sanderson) has never been an officer, and another (Skinner) was not an officer during the indictment period. Two others (Dennis and Dichter) became and still are officers and filed affidavits during the indictment period (Dennis from late 1949 to 1956 and Dichter only in 1955 and 1956), but were not such at the time (June, 1949) that the conspiracy is alleged to have been formed. The other two (Travis and Wilson) were officers and filed affidavits at that time; Wilson ceased to be an officer in 1953, but is still an employee of Mine-Mill, while Travis ceased to be an officer or in any way connected with Mine-Mill in 1955.

The prosecution's evidence[5] of conspiracy among the defendants was intended to establish that:

(1) Following enactment of the Taft-Hartley Law in 1947, Communist Party policy opposed compliance;

(2) The defendants were then members of the Communist Party, and caused Mine-Mill to follow the Communist policy of non-compliance;

(3) In 1949, the Communist Party changed its policy and instructed Party members who were union officers to file non-Communist affidavits, and to resign formally from the Party but retain a clandestine membership;

(4) In accordance with the new Party policy, Mine-Mill officers filed non-Communist affidavits and the union obtained compliance status;

(5) The defendants at that time (June, 1949) agreed that the union officers among them would secretly remain Party members and would file false affidavits; and

(6) That agreement (i.e., the conspiracy) continued and was executed by repeated false filings up to the time of the indictment.

It is not disputed that Mine-Mill opposed the Taft-Hartley law and did not comply with the filing provisions until July, 1949, when, by Executive Board action, the union decided to comply. This decision was ratified in September at the union's annual convention.

Direct evidence of conspiracy among the defendants is entirely lacking. As indirect evidence, the prosecution and the court below relied chiefly on the asserted "paral-

[5] Despite the elimination of questions (4), (5) and (6) specified in the petition for certiorari, the evidence in this case remains relevant to the determination of question (3), involving the trial court's denial of defense motions for production of the grand jury testimony of four of the five major prosecution witnesses.

lelism" between Communist Party and Mine-Mill policies with respect to compliance, on testimony concerning statements by petitioners Travis and Wilson in 1949, and especially on a public statement by Travis in August, 1949, that he had been a member of the Communist Party and had resigned from it "in order to make it possible for me to sign the Taft-Hartley affidavit" (G. Ex. 8; R. 146).[6]

In the course of trial,[7] the district court denied defense motions for production (alternatively to the defense or to the court for *in camera* inspection) of the grand jury testimony of three prosecution witnesses (R. 64-66, 256, 309, 312). The court likewise admitted the record of testimony given at the first trial by the subsequently deceased government witness Mason, overruling defense objections based on rulings made at the first trial which had deprived the defense of access to Mason's grand jury testimony, and thus of full opportunity to cross-examine him at the first trial (R. 89-91). In charging the jury, the district judge failed to instruct them that fraud was an essential element of the offense charged (R. 323-50).

The indictment charged nothing against the defendants with respect to their knowledge of the aims of the

---

[6] Travis was indicted for and convicted of the substantive offense of filing false affidavits, but, after two trials, his conviction was set aside by this Court on the ground of improper venue. *Travis v. United States*, 364 U. S. 631. He was not thereafter reindicted.

[7] The defense case, largely irrelevant to the questions now open for review, included testimony that Mine-Mill policies with respect to compliance or non-compliance with the Taft-Hartley Law were determined openly and democratically; the offer of authenticated government records (excluded by the court) showing that many other labor organizations had followed substantially the same compliance policies and at the same times; and the offer of travel and per diem vouchers of the petitioner Dichter (excluded by the trial court) to establish what amounted to an alibi (R. 317-22, and Defs. Exs. Q-1 to Q-5 for Ident. (R. 379-83)).

Communist Party, legal or illegal, their intent to promote or achieve those aims, or their activities as Communist Party members. Nor did it charge them with any state of mind or intent regarding the overthrow of government by force and violence. Other than on the question of compliance or non-compliance with the Taft-Hartley law, no evidence of petitioners' attitudes toward Communist Party objectives was offered. The jury was given no instructions bearing on these matters. Thus the case has proceeded from the outset, and throughout on the basis that under Section 9(h), bare Communist Party membership was sufficient to establish the unlawful element in the conspiracy charged in this indictment.

Summary of Argument

I.

The indictment fails to state the offense of conspiracy to defraud the United States. A. The indictment charges only a conspiracy to commit an offense, to wit, a violation of the False Statements Act, 18 U.S.C. 1001. This Court has said and lower courts have held that 18 U.S.C. 1001 applies to merely false statements, and that fraud is not an element of that offense. *United States* v. *Grainger*, 346 U.S. 235, 242-43; *Marzani* v. *United States*, 168 F.2d 133 (C.A.D.C.). The indictment invokes the language of the fraud clause, but the stated objective of the conspiracy is nothing more than violation of 18 U.S.C. 1001. Thus the fraud language is a mere cloak, and the offense of conspiracy to defraud is not made out, since fraud is not an essential element of that offense. *Bridges* v. *United States*, 346 U.S. 209 (8 U.S.C. 746, naturalization); *United States* v. *Lurie*, 222 F.2d 11 (C.A.7) (18 U.S.C. 1001). The government's efforts to distinguish these authorities are futile, the petitioners have been seriously prejudiced (as-

suming that to be pertinent) by the defect in the indictment, and there are strong general reasons of law and policy for requiring the Government to lay conspiracy indictments under the properly applicable clause.

B. The indictment does not charge petitioners with conduct involving fraud against the United States. Petitioners' union was entitled to compliance status upon the filing of the affidavits whether true or false; the Government did not rely upon their truth in granting or withholding compliance. *Leedom* v. *International Union*, 352 U.S. 145; *Amalgamated Meat Cutters* v. *Board*, 352 U.S. 153. Without such reliance there is no defrauding, and the charge of conspiracy to defraud is not made out.

II.

Section 9(h) of the Taft-Hartley Act is Unconstitutional. A. It is unconstitutional as a bill of attainder under Article I Section 9 of the Constitution. *United States* v. *Archie Brown*, 381 U.S. 437, held Section 504 of the Landrum-Griffin law of 1959 unconstitutional, and Section 9(h) presents no distinct problems. Although the *Brown* case does not explicitly overrule *American Communications Association* v. *Douds*, the later case endorses no distinctions, and the dissenting judges thought it plain that the *Douds* case had been overruled. Section 9(h) falls within the most restricted concepts of attainder, inasmuch as it is made applicable to a named organization. It likewise falls within the broader concepts of attainder adopted in *Cummings* v. *Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333.

B. Section 9(h) is unconstitutional under the First and Fifth Amendments to the Constitution. *Aptheker* v. *Secretary of State*, 378 U.S. 500, has made it clear that even non-criminal sanctions cannot validly be applied on

the basis of Communist Party membership, absent the factors of knowledge, intent, and activity relied upon in e.g., *Scales* v. *United States*, 367 U.S. 203. These factors were neither charged nor proved in the present case, nor can Section 9(h) be interpreted as embracing these additional factors as necessary elements of the offense here charged. Under the rule of *Shelton* v. *Tucker*, 364 U.S. 479, Section 9(h) sweeps too broadly and must be held unconstitutional.

III.

Petitioners' motions for the production of the grand jury testimony of key prosecution witnesses were erroneously denied. A. There was "particularized need" for the grand jury testimony of the four prosecution witnesses in question under the rule of *Pittsburgh Plate Glass*, 360 U.S. 395. Each was a key witness whose testimony was essential for the government's case. Practically all of their testimony was uncorroborated. Cross-examination revealed that there was serious doubt about the truth of the direct testimony of three of the four. Three of the four had reason for bias and prejudice. Two were accomplices and one had been a paid informer for the FBI. The trial took place in 1963, the witnesses had testified before the grand jury in 1956, and the incriminating events (mostly conversations) had taken place in the period 1949-55, the most damaging in 1949. In view of the lapse of time, scrutiny of the 1956 testimony was highly desirable. Under all these circumstances, the need of petitioners for the grand jury testimony far outweighed the policy of secrecy, none of the reasons for which were at all relevant here.

B. At least, petitioners' alternative motions for *in camera* inspection of the grand jury testimony should have been granted. *Pittsburgh Plate Glass* left open the question of an automatic right to *in camera* inspection.

The Second Circuit has answered that question in the affirmative. That practice is the minimum that fairness requires and conflicts in no way with the secrecy policy. However, even if the trial judge had discretion, the reasons we have advanced for direct production were of course equally applicable to *in camera* inspection.

"C. We suggest that the *Pittsburgh Plate Glass* decision should be reconsidered in the light of its effect over seven years as shown in the lower courts' decisions barring direct production altogether and (except in the Second Circuit) severely limiting *in camera* inspection. By contrast, on the authority of *Pittsburgh Plate Glass* and *Procter & Gamble*, 356 U. S. 677, there has been a growing tendency in civil anti-trust cases to make grand jury testimony (in the antecedent criminal cases) available for discovery before trial. Secrecy is thus less and less a barrier in civil cases, more and more of one in criminal cases. This is an anomaly which should be rectified by liberalization of the practice in criminal cases where secrecy has lost its importance and fairness is all-important.

ARGUMENT

I.

The indictment fails to state the offense of conspiracy to defraud the United States.

At the threshold of this case lies the question of the statutory sufficiency of the indictment. There is no question but that it purports to charge a violation of the fraud clause of the general conspiracy statute (18 U. S. C. 371, *infra*, p. 1a), for that statute is cited in the indictment (R. 1, 4), and the single count alleges (R. 1-2) that "the defendants herein . . . did wilfully, knowingly and unlawfully combine, conspire and agree . . . to defraud the United States and an agency thereof . . ."

This language plainly invokes the second clause of 18 U. S. C. 371, condemning conspiracies "to defraud the United States, or any agency thereof. . . ." The question remains, however, whether or not the ensuing allegations, assuming their truth, make out such a conspiracy, within the principles established in *Bridges* v. *United States*, 346 U. S. 209, *Leedom* v. *International Union of Mine, Mill & Smelter Workers*, 352 U. S. 145, and other pertinent authorities.

A. The Indictment Charges Only a Conspiracy to Commit an Offense of Which Fraud is Not an Element.

It is well established that 18 U. S. C. 371 is a bifurcated statute charging two different types of conspiracies,[8] and that the essential elements of these offenses are different. Therefore, a conspiracy indictment, to be valid, must lay the charge under the proper clause unless it meets the requirements of both.

For example, an indictment laid under the first ("offense") clause must charge that the conspiracy had an object constituting a statutory offense; failing this it must be dismissed for lack of an essential allegation. *United States* v. *Keitel*, 211 U. S. 370. Likewise, an indictment brought under the second ("fraud") clause must specify a fraud on the United States as the conspiracy's object,

[8] The conspiracy provision (now 18 U. S. C. 371) and the so-called continuing offense statute (now 18 U. S. C. 3237) originally comprised the two sentences of Sec. 30 of "An Act to Amend Existing Laws Relating to Internal Revenue, and for Other Purposes", enacted March 2, 1867. See *United States* v. *Gradwell*, 243 U. S. 476, 481. This section was not part of the bill as it passed the House of Representatives; it was added as an amendment in the Senate Committee on Finance, and was adopted by the Senate without discussion on motion of the floor manager, Senator William Pitt Fessenden. See the *Congressional Globe*, 39 Cong. 2d Sess., pp. 1846, 1881, 1920 and 1968. The conspiracy portion became R. S. 5440, and the "continuing" portion R. S. 731.

ings was a punishable offense under 8 U. S. C. 746(a)(1), with which Bridges was charged under the second count of the indictment. The question at issue was whether the indictment was barred by the general three-year statute of limitations, or saved by the Wartime Suspension of Limitations Act (18 U. S. C. 3287) applicable to offenses "involving fraud against the United States . . . whether by conspiracy or not." The Supreme Court held that fraud was not a necessary element of the statutory offense of making false statements in immigration proceedings, and that the second count of the indictment was therefore barred.

The question remained whether the first count, charging conspiracy to defraud, was also barred. There, as here, the government contended that fraud on the United States was charged and practiced, and that conspiracy to defraud was properly charged even though fraud was not a necessary element of the statutory offense. But this Court held that the conspiracy count was also barred, because it actually described only a conspiracy to commit an offense of which fraud was not an element (346 U. S. at 223-24):

> "The Government contends that the General Conspiracy Act under which Count I is laid comprises two classes of conspiracies: (1) 'to commit any offense against the United States' and (2) 'to defraud the United States in any manner or for any purpose.' It urges that the indictment here charges a conspiracy to defraud the United States under the second clause. It suggests that, under that clause, proof of a specific intent to defraud is an essential ingredient of the offense and thus brings Count I within the Suspension Act. The fallacy in that argument is that, while the indictment may be framed in the language of the second clause, both it and the proof to support it rely solely on the fact of a conspiracy to commit the substantive offenses violating § 346(a)(1) or § 346(a)(5) as charged in Counts II and III. Count I actually charges that petitioner conspired to 'defraud the

> United States,' only by causing the commission of the identical offenses charged in Counts II and III. The use in Count I of language copied from the second clause of the conspiracy statute merely cloaks a factual charge of conspiracy to cause, or knowingly to aid, Bridges to make a false statement under oath in his naturalization proceeding, or to obtain by false statements a Certificate of Naturalization to which he was not entitled."

So here, the indictment is "framed in the language of the second clause," but the factual charge is merely one of conspiracy to commit the offense of filing false affidavits—an offense of which fraud is not an element. *United States* v. *McElvain*, 272 U. S. 633; *United States* v. *Lurie*, *supra*, p. 13.

The government attempts (Opp. Br. pp. 7-8) to distinguish the *Bridges* case on the ground that it construed the Wartime Suspension of Limitations Act rather than the conspiracy statute (18 U. S. C. 371). But this is a question-begging play on words, for if the *Bridges* indictment had properly charged a conspiracy to defraud the United States, the Suspension Act would have been applicable, and the indictment would not have been barred by limitations. Indeed it was in an effort to escape the limitations bar that the government invoked the fraud clause of 18 U. S. C. 371 but, as this Court held, the "fraud" language was a mere cloak.

No doubt the motivation is the same in the present case. The bulk of the government's evidence germane to the conspiracy as charged related to the affidavits filed by two of the petitioners (Travis and Wilson)[12] in 1949, seven years before the indictment was brought. Whether the three-year statute of limitations in effect in 1949 or the five-year statute enacted in 1954 be applicable, prosecu-

[12] The defendant Van Camp, acquitted at the second trial, filed only one affidavit, and that was in 1949.

tions for false filings based on these 1949 affidavits were barred before 1956, and this Court said in the *Bridges* case (346 U. S. at 222) that: "A charge of conspiracy to commit a certain substantive offense is not entitled to a longer statute of limitations than the charge of committing the offense itself."

But whether or not the Suspension Act or any other limitations question be involved, the indictment must be laid under the clause of 18 U. S. C. 371 that fits the actual charge. The prejudice that may be consequent on looseness is apparent in this very case. Since fraud is an essential element of the offense under the fraud clause,[13] the jury must of course be instructed that they cannot convict unless they find that the defendant(s) intended to defraud the United States.[14] Yet here the trial court failed to charge fraud as an essential element, despite the defendants' explicit request (R. 351).

The distinction between the fraud and offense clauses has other practical consequences, such as in the matter of double jeopardy and sentencing. Many violations of 18 U. S. C. 1001 are relatively innocuous, e.g., *United States* v. *Tommasello*, 160 F. 2d 348 (C. C. A. 2, 1947); *Walker* v. *United States*, 192 F. 2d 47 (C. A. 10, 1951). On the other hand, conspiracy to defraud is regarded as a heinous

---

[13] We do not understand that the Government contests this proposition and, indeed, it so argued in the *Bridges* case, with the apparent approval of this Court (346 U. S. at 223, quoted *supra*, pp. 14-15). See also *Salas* v. *United States*, 234 Fed. 842, 845 (C. C. A. 2) ("The statute clearly contemplates that the parties shall intend to defraud the United States. . . ."); *Bergen* v. *United States*, 145 F. 2d 181, 187 (C. C. A. 8).

[14] See, *e.g.*, the charges in *United States* v. *Belisle*, 107 F. Supp. 283, 287 (W. D. Wash. 1951); *United States* v. *Bayer*, 331 U. S. 532 (Trans. of Rec. 1138, 1160-61); *United States* v. *Walsh*, Fed. Cas. No. 16,636 (C. C. E. D. Mo. 1878).

offense, and this estimate may well lead to a heavier sentence. See *United States* v. *Belisle*, 107 F. Supp. 283, 286 (W. D. Wash. 1951).

B. The Indictment Fails to Charge Conduct Which in Fact Involves Fraud.

Quite independently of the foregoing, the indictment is defective because the conduct of which petitioners are accused did not in fact involve fraud. In this respect the case is even clearer than the *Bridges* case, for there it was charged that fraud was present in fact (i.e., in obtaining naturalization by means of a false statement) even though the relevant section of the Nationality Act applied to all false statements, whether or not fraudulent (346 U. S. at 212-13). But here the motives and actions of the accused, as charged in the indictment, do not establish either an intent to defraud the United States, or that the United States was in fact defrauded.

To be sure, it has long been settled that the fraud need not be pecuniary, or even related to property, in order to be punishable under 18 U. S. C. 371. *United States* v. *Keitel*, 211 U. S. 370; *Glasser* v. *United States*, 315 U. S. 60. Corruption or obstruction of government functions of any kind will lay the basis for a prosecution, but these consequences must be attributable to fraud. In other words, there must be an intent that the government rely on representation, and take or refrain from action because it is misled by the fraudulent conduct. As this Court ruled in *Hammerschmidt* v. *United States*, 265 U. S. 182, 188:

> "It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention."

In the present case, the Labor Board did not rely on the truthfulness of the non-Communist affidavits and, assuming they were false, that falsity did not influence or induce the Board to issue certificates of compliance to Mine-Mill, nor did it affect the Board's action in any other way. It was the fact of filing, and not the truth or falsity of the affidavit filed, which was the basis of compliance and Board action. *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145; *Amalgamated Meat Cutters* v. *National Labor Relations Board*, 352 U. S. 153.

The policy of the Taft-Hartley Law was that if a union officer failed to file a non-Communist affidavit, the union must either forego the benefits of compliance or get rid of the officer and select a new one who would file. But if all the officers had filed such affidavits, the union was entitled to compliance status whether the affidavits were true or false. The Board relied on the filing (hence, presumably, would have been "defrauded" by *forged* affidavits), but not on the truth of what was filed; prosecution of the union officer under 18 U. S. C. 1001 was the only sanction for false filing, as was held in the *Leedom* and *Meat Cutters* cases, *supra*.

This case, therefore, is quite unlike the many others in which it has been held that a false document or statement works a fraud on the government by corrupting or obstructing government functions. In an immigration case, for example, the government grants entry on the basis that a representation of marriage is true. *Lutwak* v. *United States*, 344 U. S. 604. In other cases the government may convey public lands, or issue passports, or rest content with taxes as paid, or do or refrain from doing a vast variety of things in reliance on the truthfulness of a representation of some kind. But the statutory policy involved in the present case was to grant compliance to a union whose officers denied Communist ties, whether those

denials were true or false. If false, it may be true, as the trial judge wrote (R. 15-16), that a "false key" was used to obtain the benefits of compliance. But for that purpose the government was as content with a false as with a true key; it gave the union its certificate and pursued the affiant under 18 U. S. C. 1001. As the Court said in the *Leedom* case (352 U. S. at 151), the policy of the statute was to penalize the guilty officers, not the members of the union for conduct of which they were ignorant.

It is to be noted that, in the only other conspiracy case based on Section 9(h) of the Taft-Hartley Law, the Government laid the indictment under the offense clause of 18 U. S. C. 371, thus omitting any charge of fraud. *West v. United States*, 274 F. 2d 885 (C. A. 6), cert. den. 365 U. S. 819. The *West* indictment (Jan. 23, 1957) was filed *after* the *Leedom* and *Meat Cutters* decisions (Dec. 10, 1956); the present indictment antedated them (Nov. 16, 1956). It is a permissible inference that the Government recognized the implications of those decisions, and shifted to the offense charge in order to avoid (in part) the disabilities to which the present indictment is subject.

Those disabilities are fatal, and accordingly these judgments should be reversed and the cases remanded with instructions to dismiss the indictments for failure to state an offense.

II.

Section 9(h) of the Taft-Hartley Act is unconstitutional.

Both on its face and as applied to the petitioners, Section 9(h) of the Taft-Hartley Act is unconstitutional under the First and Fifth Amendments to the Constitution, and as a bill of attainder under Article I Section 9 of the Constitution. As indicated in our petition for

certiorari (pp. 11-12),[15] the two recent decisions of this Court that were invoked as warranting review of the constitutional issues are *United States* v. *Archie Brown*, 381 U. S. 347, and *Aptheker* v. *Secretary of State*, 378 U. S. 500.

A. Section 9(h) is Unconstitutional as a Bill of Attainder.

The scope of the prohibition against bills of attainder in Article I Section 9 of the Constitution has been so recently and exhaustively analyzed by this Court in the *Archie Brown* case, *supra*, that extensive discussion herein would serve no useful purpose. The only question is whether Section 9(h) of the Taft-Hartley law, here at stake, differs in any constitutionally significant way from its successor statute, Section 504 of the Labor Management Reporting & Disclosure Act of 1959 (29 U. S. C. 504), which was held unconstitutional as a bill of attainder in the *Archie Brown* case.

A comparison of the two statutes[16] will show that Section 504 makes it a criminal offense for anyone who

---

[15] In opposing the petition for certiorari, the Government contended (Opp. Br., pp. 10-13) that "the validity of Section 9(h) is not a proper issue in this case", relying chiefly on *United States* v. *Kapp*, 302 U. S. 214 and *Kay* v. *United States*, 303 U. S. 1. In their reply to the Government's opposition (at pp. 3-4), petitioners pointed out the irrelevance of the *Kapp* and *Kay* cases (in both of which the defendants made false statements in order to obtain financial benefits from the Government) and the dangers that would flow from applying them in a case like the present one, in which petitioners are merely exercising rights which would be open to them in the absence of the unconstitutional statute under which the allegedly false statements are required to be made. We do not believe that the point is substantial, and in any event it appears to be foreclosed by the Court's order granting certiorari. Should the Government continue to press it, we will, in reply, deal with the question to whatever extent may then be necessary.

[16] Both are set forth in the Appendix, *infra*, pp. 2a-3a.

is or has within the preceding five years been "a member of the Communist Party" to serve as an officer of "any labor organization" while Section 9(h) barred compliance status before the National Labor Relations Board to labor organizations unless their officers had filed affidavits denying membership in or affiliation with the Communist Party. In *American Communications Assn.* v. *Douds*, 339 U. S. 382, this Court upheld Section 9(h) against constitutional challenges, including one based on the bill of attainder clause, 339 U. S. at 413-15.

The Court's opinion in the *Archie Brown* case does not explicitly overrule the *Douds* case, but it does explicitly refuse to find that the two cases can be satisfactorily distinguished. To say, as the Court's opinion in the *Archie Brown* case does (381 U. S. at 457), that "[t]his case is not necessarily controlled by Douds" is certainly to underline a refusal to reaffirm the *Douds* case by endorsing a distinction.

The difference indicated following this observation (381 U. S. at 457-58) is that the restriction in Section 9(h) applies only to present Communist membership, whereas Section 504 also covers a five-year period after termination of such membership. In the *Douds* case, the Court's opinion (339 U. S. at 413-14) relied on Section 9(h)'s limitation to present membership to show that, since its restrictions could be escaped by resigning from the Party, the purpose was "to prevent future action rather than to punish past action". However, the *Archie Brown* opinion, after stating these differences, proceeds to pronounce them insufficient as a basis of distinction; "punishment" in a bill of attainder sense includes not only retributive punishment for the past, but deterrent and preventive punishment to protect the future (381 U. S. at 458-60), and "inescapability" is not an essential feature of attainder (381 U. S. at 457, n. 32), as had been pointed out in the Court's first opinion dealing with attainder. *Cummings* v. *Missouri*, 4 Wall. 277, 324.

At two separate points, the Court's opinion in the *Archie Brown* case criticizes the conceptual basis and reasoning of the *Douds* opinion on the bill of attainder point.[17] The four dissenting members of the Court were of the opinion that, by virtue of the *Brown* decision (381 U. S. at 464-65): "*American Communications Association* v. *Douds* . . . , which upheld the predecessor statute to § 504 is obviously overruled."

Under both the majority and minority opinion in the *Archie Brown* case, accordingly, there is no basis for distinguishing the present case from the *Brown* case, and under its authority Section 9(h) of the Taft-Hartley law must be held unconstitutional as a bill of attainder. Furthermore, apart from what is said in the *Brown* opinions, neither history, prior authority, or logic offer any sufficient basis for distinguishing the two cases.

Prior to the adoption of the Constitution, most (but not all) bills of attainder were directed against one or more named individuals.[18] As an original proposition, it might have been contended that the proscription of Article I Section 9 (and, presumably, of the parallel prohibi-

---

[17] After stating the view that the bill of attainder proscription is an "implementation of the separation of powers" (381 U. S. at 442) and an important safeguard against legislative adjudication, the Court observed (381 U. S. at 447): "It is in this spirit that the Bill of Attainder clause was consistently interpreted by this Court —until the decision in *American Communications Ass'n.* v. *Douds* . . . which we shall consider hereafter." At a later point, in discussing the question whether punishment for past actions rather than as a preventive for the future is an essential element of attainder, the Court declared (381 U. S. at 460): "We think the Court in *Douds* misread *United States* v. *Lovett* when it suggested, 339 U. S. at 413 . . . that the case could be distinguished [*i.e.*, from *Douds*] on the ground that the sanction there imposed [*i.e.*, in *Lovett*] was levied for purely retributive reasons."

[18] The pre-Constitutional history of bills of attainder is set out so fully in the Court's opinion in the *Brown* case that recapitulation herein is quite unnecessary. Additional historical information is to be found in Note 72 Yale L. J. 330 (1962), and in the brief for the petitioners in *United States* v. *Lovett*, 328 U. S. 303, Nos. 809-11, October term 1945, pp. 112-138.

tion in Section 10) was confined to such "naming" enactments. But in the very first cases before this Court in which the problem arose, and although that very argument was made, the bill of attainder proscription was held to apply to acts which named no individual or group, but which called for qualifying oaths of non-involvement with the Confederacy as a condition of voting, office-holding and practicing various professions. *Cummings* v. *Missouri*, 4 Wall. 277, 279-81, 294, 296-97, 323-24; *Ex parte Garland*, 4 Wall. 333, 334-35.[19]

The attainder problems presented by "naming" laws on the one hand and "non-naming" group enactments on the other are overlapping but not congruent. We respectfully urge that both Section 9(h) and Section 504 fall in the overlapping area and that they are not significantly different under any acceptable analysis.

To begin with, both are "naming" enactments, and thus constitutionally vulnerable without resort to the broader concepts adopted in the *Cummings* and *Garland* cases. True, they do not name individuals (as did the statute denounced as an attainder in the *Lovett* case, *supra*), but they both apply their respective sanctions to the members of an organization specified by name, the Communist Party. Thus the law is phrased in special and individually designatory rather than general terms; the Communist Party is its subject regardless of how the characteristics of that organization might change, while no other group is covered whether or not it displays whatever characteristics might be thought similar to those of the Communist Party.[20]

---

[19] The four dissenting judges in these cases would have restricted the constitutional proscription to "naming" enactments, 4 Wall. at 389.

[20] To venture an analogy, Congress might well require that officers of the armed services state their willingness to bear arms in national defense. Congress might also "find" that members of the Society of Friends are unwilling to do that. Nevertheless, a bill disqualifying as officers all "Quakers" rather than "those unwilling to bear arms" would be a bill of attainder.

As the *Archie Brown* opinion points out (381 U. S. at 450-52), the registration provisions of the Subversive Activities Control Act of 1950 (50 U. S. C. 781 *et seq.*) were upheld, against challenge as attainder, precisely on the ground that the law did *not* specify any organization by name, but by defined charactertistics to be applied by administrative and judicial determination. *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1, 82-88. It is true that the Communist Party was designated by name in *Flemming* v. *Nestor*, 363 U. S. 603, but there the law was upheld against attainder challenge on the ground that (363 U. S. at 617) the "sanction is a mere denial of a non-contractual benefit" (old-age benefit payments), and therefore imposed no "punishment".[21] Whatever the continued vitality of that conclusion, it can have no application to the present case, in which unions were deprived under Section 9(h) of rights to which they would otherwise be clearly entitled unless their officers disavowed Communist Party membership.[22]

"Non-naming" statutes, such as those invalidated in the *Cummings* and *Garland* cases, *supra*, present additional problems of analysis. Statutes imposing penalties, restrictions, and qualifications of various sorts on groups of persons designated not by name but by general characteristics are an ancient and accepted feature of the statutory scene.

---

[21] But *cf. Cummings* v. *Missouri*, 4 Wall. at 320: "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the cause of the deprivation determining this fact."

[22] See the *Douds* case, 339 U. S. at 389-90: "It cannot be denied that the practical effect of denial of access to the Board and the denial of a place on the ballot in representation proceedings is not merely to withhold benefits granted by the Government but to impose upon non-complying unions a number of restrictions which would not exist if the Board had not been established. . . . The fact is that § 9(h) may well make it difficult for unions to remain effective if their officers do not sign the affidavits."

In the *Cummings* and *Garland* cases the sanctions were applied to those (determined by negative oath) who had given aid, comfort, or even sympathy to those in armed hostility to the United States, including specifically but not exclusively the Confederate cause. By what principle is such a law to be distinguished from those many, of unquestioned validity, which impose qualifications for office or professional practice, or lay down other restrictions preventive of "conflict of interest"?[28]

It has been said (as in *Flemming* v. *Nestor, supra,* and in the dissenting opinion in the *Brown* case, 381 U. S. at 462) that the issue turns on inquiring whether the purpose of the restriction is "punitive" or "regulatory". Petitioners suggest, with all respect, that these adjectives may be more useful as statements of conclusions reached than as tools for reaching them. Some statutes imposing restrictions may be purely "punitive" and others purely "regulatory", but often they are both, and these are the cases which the courts are most likely to confront. *Cf. Trop* v. *Dulles,* 356 U. S. 86, 96: "The Court has recognized that any statute decreeing some adversity as a conse-

[28] These problems of analysis are reflected in the extensive discussion in both the majority and minority opinions in the *Archie Brown* case (381 U. S. at 453-56 and 465-69) of *Board of Governors* v. *Agnew,* 329 U. S. 441, involving Section 32 of the Banking Act of 1933 (12 U. S. C. 78 (1964 ed.)), which prohibits underwriters from serving as directors of Federal Reserve member banks. The dissenting justices thought the majority made "no meaningful distinction" between Section 32 and Section 504 of the Labor Management Act (381 U. S. at 466), and themselves encountered the problem of distinguishing Section 32 from the statute invalidated in the *Cummings* case (381 U. S. at 476). We suggest that in Section 32 Congress sought to prevent situations of conflict of interest, irrespective of the propensities of individual underwriters; whereas in Section 504 and Section 9(h), Congressional concern was directly focused on particular propensities thought to arise from Party affiliation.

quence of certain misconduct may have both a penal and a non-penal effect."

The problem has been described as not unlike those often presented under the due process and equal protection clauses. Do the group specified and the adversity imposed bear a reasonable relation to a lawful legislative purpose? Although he wrote two years before the adoption of the 14th Amendment, Mr. Justice Field saw the matter in just those terms, the first time it arose in an attainder context, in *Cummings* v. *Missouri*, 4 Wall. at 319-20:

> "Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession . . . It is evident from the nature of the pursuits and professions of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions . . . The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling."

This passage of the *Cummings* opinion, and the test of "reasonable relation" which it embodies, were relied on by the Court in subsequent cases to distinguish and sustain, against attainder challenge, statutes specifying qualifications for the practice of medicine. *Dent* v. *West Virginia*, 129 U.S. 114, 126; *Hawker* v. *New York*, 170 U.S. 189. It is probably too inclusive a test for attainder in its traditional guise,[24] and it cannot be applied (at

---

[24] Examples of enactments which impose adverse consequences on a group defined in general but unreasonable terms are not difficult to find. See, *e.g.*, *Skinner* v. *Oklahoma*, 316 U. S. 535; *Gangemi* v. Rosengard, 44 N. J. 166 (1965). In neither case would the adversity

least without careful qualification) to bills that specify individuals or organizations by name.[25] Nevertheless, there is an obvious and close relation between the vice of attainder and of unreasonable and oppressive classifications that violate the guaranty of equal protection of the laws, as was clearly noticed in the opinion of the late Mr. Justice Frankfurter in the *Lovett* case, 328 U.S. at 326-28; see also the dissenting opinion of Mr. Justice White in the *Brown* case, 381 U.S. at 476;[26] *Hurtado* v. *California*, 110 U.S. 516, 535-36.

Of course, there is room for sharp division of opinion whether or not the defined group and the sanction bear

---

be commonly described as an "attainder", though the principles of the *Cummings* and *Garland* cases would appear to be applicable. Perhaps if the *Cummings* and *Garland* cases had been decided after judicial development of due process and equal protection, the Court would have utilized those grounds in addition to attainder.

[25] See Note 72 Yale L. J. 330, 349-52 (1962), in which criticism of the "reasonable relation" test is based on the observation that a legislature could "reasonably" conclude that a named person or member of a given organization (*e.g.*, the Ku Klux Klan) have certain disqualifying characteristics. However, under the principle that legislation should be general (which lies at the root of the proscription of attainders) a legislature cannot properly "know" or "find" that a named individual or organization is "better" or "worse" than any other, and accordingly any bill classifying by name is unreasonable by definition. Cf., *Hurtado* v. *California*, 110 U. S. 516, 535-36.

[26] The affinity between the vice of attainder and unequal protection does not, historically speaking, make surplusage of the attainder proscriptions in Sections 9 and 10 of Article I. Until 1868 and the Fourteenth Amendment, the states (Section 10) were not bound by either due process or equal protection and, in view of English and colonial practice, it might well have been held, in the absence of specific prohibition, that bills of attainder were not prohibited by the due process clause of the Fifth Amendment. The federal government is not bound by the equal protection clause of the Fourteenth Amendment, but it is accepted that the due process clause of the Fifth Amendment embodies the elements of equal protection. *Bolling* v. *Sharpe*, 347 U. S. 497, 499; *Hirabayashi* v. *United States*, 320 U. S. 81, 100; *cf. Hurtado* v. *California*, 110 U. S. 516, 535-36.

reasonable relation to a valid Congressional purpose. In the *Brown* case, a majority of the Court found no sufficient "demonstrable relationship" (381 U.S. at 456) between bare Communist Party membership and the prevention of "political strikes"; the minority thought otherwise (381 U.S. at 470-72 and 478),[27] as did the majority in the *Douds* case (339 U.S. at 391). The position of the majority in the *Brown* case is well-grounded in history, for it was political groups that "were the targets of the overwhelming majority of English and early American bills of attainder" (381 U.S. at 453). *The Supreme Court, 1964 Term*, 79 Harv. L. R. 56, 123 (1965).

If the standard of "reasonable relation" be thought relevant to the attainder issue, accordingly, the present case is plainly governed by the *Archie Brown* case, because the political group against whom the sanctions are directed (*i.e.*, members of the Communist Party) is the same in Section 9(h) as in Section 504. But, as indicated in the earlier part of this point (*supra*, p. 22), the problem of classification need not be reached, for Section 9(h), like Section 504, is directed against the members of a particular organization specified by name, and is there-

---

[27] The minority in the *Brown* case appear (381 U. S. at 470 and 478) to base their conclusion (at least in part) on the 1956 findings with respect to the Communist Party in *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1—findings which were of course not available in 1947 when Congress enacted Section 9(h) of the Taft-Hartley law. But even if the 1956 findings could be used for a sort of retrospective validation of Section 9(h)—a notion dubious enough in view of the circumstance that petitioners in the present case were indicted in 1956—we do not think that the SACB findings are of any assistance to the Government in the present case. *Cf.* the decision of this Court in 1957 concerning the Communist Party, based on the record in *Yates* v. *United States*, 354 U. S. 298, at 329-30, and the observation in *Noto* v. *United States*, 367 U. S. 290, at 299; "It need hardly be said that it is upon the particular evidence in a particular record that a particular defendant must be judged and not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party."

fore invalid as a bill of attainder under the traditional concepts antedating the *Cummings* and *Garland* cases.

For all the foregoing reasons, Section 9(h) must be held invalid as a bill of attainder, proscribed by Section 9 of Article I of the Constitution.

B. Section 9(h) is Unconstitutional under the First and Fifth Amendments.

Archie Brown challenged Section 504 of the Landrum-Griffin law not only as a bill of attainder, but also as a violation of both the First Amendment and the due process clause of the Fifth Amendment,[28] and it was on these latter grounds that he prevailed in the Court of Appeals for the Ninth Circuit, sitting *en banc*. *Brown* v. *United States*, 334 F. 2d 488.[29] On review here, the Court rested its decision on the bill of attainder clause alone, and neither the majority nor the minority Justices expressed any opinion on the other constitutional contentions.[30]

Section 9(h) of the Taft-Hartley law was sustained against a First Amendment challenge in the *Douds* case. To that extent, accordingly, petitioners here are asking the Court to overrule the *Douds* case, on substantially the grounds relied on by the Court of Appeals in the *Archie Brown* case. It is true, of course, that the Court of Appeals was bound by and therefore distinguished the *Douds* case from the one before it (334 F. 2d at 493-95), pointing

---

[28] Indeed both in the lower courts and in this Court, Brown's principal contentions were laid under the First and Fifth Amendments, rather than the prohibition of attainders.

[29] Five of the eight judges concurred in Judge Merrill's opinion for the court. Judge Hamley would have reversed the conviction on procedural grounds without reaching the constitutional questions, and the remaining two judges, dissenting, would have sustained the statute as constitutional.

[30] 381 U. S. at 440 and 478.

to the differences in scope and impact between Section 9(h) and Section 504. We respectfully urge, however, that the distinctions so relied on are plainly insufficient in the light of recent decisions by this Court, including particularly *Aptheker* v. *Secretary of State*, 378 U. S. 500.

In approaching the constitutional questions now stirred, there are two matters which, we believe, are beyond contrary contention and are basic to the ensuing analysis.

(1) The case was tried and adjudicated below on the assumption that mere membership in the Communist Party, irrespective of elements such as knowledge, intent, or activity, was all that was required to bring Section 9(h) into operation, and to provide the unlawful element in the conspiracy charged in this indictment. The indictment alleges no more; no more was proved or offered to be proved; no more was required in the charge to the jury; no more has been invoked to support the judgments of conviction.[31]

(2) Section 9(h) is not susceptible to any such narrowing construction as this Court has placed on the provisions of the Smith Act, especially the so-called "membership clause" thereof. *Cf. Scales* v. *United States*, 367 U. S. 203. The structure and *modus operandi* of Section 9(h) and its purpose were as described by this Court in the *Douds* case, 339 U. S. at 387-89, 416-22 (Frankfurter, *J.* concurring), 422-35 (Jackson, *J.* concurring). Throughout the twelve years of its life, Section 9(h) was administered and judicially enforced on the basis that it applied to all members of the Communist Party, of whatever shade

[31] Consequently, no such issue is presented here as the one that divided the Court in the *Aptheker* case, *supra*, where the three dissenting Justices thought (378 U. S. at 521-25 and 529) that Section 6 of the Subversive Activities Control Act could constitutionally be applied to the individual petitioners, regarded (378 U. S. at 525) as "top Party functionaries".

of opinion or degree of activity. So too, all the reasons which in the *Aptheker* case restrained this Court from giving a restricted interpretation to Section 6 of the Subversive Activities Control Act (378 U. S. at 515-17) are equally applicable to Section 9(h).[32]

The constitutional vice now under discussion may be described both in First Amendment terms, as an unwarranted restriction on the freedom of speech and association of the petitioners as union officers and employees, and in Fifth Amendment (due process) terms as an unwarranted limitation on the petitioners' rights to engage in union activities, and vote for and be elected as union officers. Although these contentions are conceptually distinct, we do not think it necessary to discuss them separately,[33] for the considerations governing their applicability are closely interrelated, as the opinions in the *Aptheker* case demonstrate.

That case involved the validity of Section 6 of the Subversive Activities Control Act of 1950 (50 U. S. C. 785), which made it unlawful for a member of a "Communist organization" subject to a registration order to apply for, renew, or use a passport. Appellants there challenged the statute under the First and Fifth Amendments and the attainder clause. Writing for five members of the Court, Mr. Justice Goldberg held it an unconstitutional restriction on the appellants' "right to travel abroad", which (under the holding of *Kent* v. *Dulles*, 357 U. S. 116) was an important part of the "liberty" guaranteed in the due process clause. Insofar as the government sought to support the

---

[32] The Court of Appeals in the *Archie Brown* case considered and rejected the "narrow interpretation" technique (334 F. 2d at 497) for Section 504, and the reasons relied on there are also precisely applicable to Section 9(h).

[33] Insofar as the attainder argument involves considerations of equal protection, we also rely on the due process clause in its equal protection guise, as indicated *supra*, pp. 26-27.

statute on the ground that appellants could "recapture" their freedom to travel by resigning from the organization (the Communist Party), the Court relied on the First Amendment, declaring (378 U. S. at 507):

> "Since freedom of association is itself guaranteed in the First Amendment [citing eight prior decisions], restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association."

Concurring in the Court's opinion, Mr. Justice Douglas stressed the close relation between the right to travel and First Amendment guarantees (378 U. S. at 520): "Freedom of movement is kin to the right of assembly and to the right of association." Mr. Justice Black, however, did not concur in the Court's opinion because (378 U. S. at 518-19) he could find no right to "travel abroad at will" in the due process clause, and preferred to ground his own opinion on the First Amendment, the bill of attainder clause, and the procedural guarantees of the Fourth, Fifth, and Sixth Amendments.[34]

In holding the statute there in question invalid, Mr. Justice Goldberg was chiefly moved by its excessive breadth (378 U. S. at 505), and particularly by its disregard of the appellants' state of mind and degree of participation (378 U. S. at 510-11):

> "The section also [35] applies whether or not one knows or believes that he is associated with an organization operating to further aims of the world

[34] Dissenting, Mr. Justice Clark and Mr. Justice Harlan thought (378 U. S. at 525-26) that "the restriction is reasonably related to the national security." Together with Mr. Justice White, they also thought it could be validly applied to the appellants if not to (370 U. S. at 525) "unknowing members".

[35] The "also" refers to an additional factor previously referred to, irrelevant to the present case.

> Communist movement. . . . The provision therefore sweeps within its prohibition both knowing and unknowing members. . . .
>
> "Section 6 also renders irrelevant the member's degree of activity in the organization and his commitment to its purpose. These factors, like knowledge, would bear on the likelihood that travel by such a person would be attended by the type of activity which Congress ought to control. . . . Section 6, however, establishes an irrebuttable presumption that individuals who are members of the specified organizations will, if given passports, engage in activities inimical to the security of the United States."

The constitutional analysis in the *Aptheker* case closely parallels that in the opinion previously rendered by the Court of Appeals in the *Brown* case.[36] That opinion did, indeed, distinguish the *Douds case* (334 F. 2d at 493-95) on the ground that, unlike Section 9(h) of the Taft-Hartley law, Section 504 involves criminal sanctions for simultaneous union office-holding and Communist Party membership. But that distinction, whatever its merit when put forward, lost its force with the rendition of this Court's judgment in the *Aptheker* case which, like the present one, involved a non-criminal sanction, i.e., loss of passport privileges.

---

[36] The *Aptheker* decision was handed down on June 22, 1964; the Court of Appeals' *Brown* decision was three days earlier. Writing for the majority, Judge Merrill, relying on *Scales* v. *United States*, 367 U. S. 203, and *Noto* v. *United States*, 367 U. S. 290, ruled (334 F. 2d at 493) that a criminal conviction based on Communist Party membership could "escape First Amendment condemnation" only if "defendant was an 'active' member of such an organization with a specific intent to further such unlawful purposes." Again relying on the *Scales* case, Judge Merrill also declared (334 F. 2d at 495-96) that, under the due process clause, criminal guilt can not be imputed to Communist Party members, absent "specific intent to use union office to interrupt interstate commerce" or active and purposeful participation "in furtherance of illegal party activities aimed at overthrow of the Government."

There is no sufficient basis for distinguishing the *Aptheker* case from the present one. If in the former the "right to travel abroad" is a liberty guaranteed by the due process clause, so also is the right to engage in other normal activities of life, including union affairs and office-holding. The *Douds* case itself (339 U. S. at 389-90) recognizes that Section 9(h) imposed on these activities "restrictions which would not exist if the [National Labor Relations] Board had not been created." The crucial missing elements noted by the Court in the *Aptheker* case (378 U. S. at 509-11)—knowledge of Communist aims, intent to promote those aims or engage in feared pursuits, active participation in Party affairs—are equally lacking in the present situation. In the context of the Bill of Rights, as this Court declared in *Wieman* v. *Updegraff*, 344 U. S. 183, 191: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." *Cf. Schneiderman* v. *United States*, 320 U. S. 118, 136; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 246.

Nor can there be any doubt that the First as well as the Fifth Amendment protects the petitioners' union activities. *Cf. Thomas* v. *Collins*, 323 U. S. 516, 537-38. As the Court stated in *N.A.A.C.P.* v. *Button*, 371 U. S. 415, at 430:

> "We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record . . . subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus we have affirmed the right 'to engage in association for the advancement of ideas and beliefs.' *N.A.A.C.P.* v. *Alabama, supra*, at 460. We have deemed privileged, under certain circumstances, the efforts of a union official to organize workers. *Thomas* v. *Collins, supra*. . . ."

Since the rights here in question are constitutionally protected, as indeed was recognized in the *Douds* case (339 U. S. at 393), the question is whether their infringement by Section 9(h) can be upheld on the basis of a "clear and present danger" or other applicable "balancing" test, as was done in, *e.g.*, *Dennis* v. *United States*, 341 U. S. 494, and in the *Douds* case itself (339 U. S. at 400, 412). And on this point, as the Court noted in the *Aptheker* case (378 U. S. at 508), the principle of "narrow achievement" must also be applied. In *Shelton* v. *Tucker*, 364 U. S. 479, Mr. Justice Stewart (speaking for the Court) wrote (at 488):

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

The same considerations that led this Court in the *Aptheker* case to find that the statute there in question (378 U. S. at 514) "sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment" are equally applicable here. The decision in the *Douds* case cannot survive the reasoning and result of the *Aptheker* case, and must be regarded as no longer controlling.

Accordingly, the present judgment must be reversed, should these questions be reached, on the ground that Section 9(h) is unconstitutional under the First and Fifth Amendments to the Constitution.

III.

Petitioners' motions for the production of the grand jury testimony of key prosecution witnesses were erroneously denied.

Four of the government's five principal witnesses—Locke, Fikes, Gardner and Mason—had testified in 1956 before the grand jury which returned the indictment. (Lawrence, the fifth, had not so testified). At the conclusion of the direct examination of Locke, Fikes and Gardner, and again after the cross-examination of Fikes and Gardner, the defense moved for the production of their grand jury testimony directly to it or, in the alternative, to the court for *in camera* inspection and then to the defense if the examination disclosed inconsistencies with the trial testimony of the witness. The trial judge denied all of these motions on the ground that no "particularized need" had been shown (R. 64-66; 256; 309-11; 312; 346 F. 2d 10, 17).

Mason had testified on the first trial, but died before the second, *supra*, p. 6. In his case, the trial judge had denied similar motions addressed to his grand jury testimony on the first trial (R. 176). On the second trial, the defense objected to the admission of his first trial testimony on the ground that the denial of the motions on the first trial had deprived the defense of its full right of cross-examination (R. 89-91). The objection was overruled (R. 91). Since Mason was no longer available for cross-examination on the second trial, his first trial testimony should not have been received if the denial of the motions for his grand jury testimony on the first trial was erroneous.

The opinion below ignored the motions for production of the grand jury testimony directly to the defense. Although the court noted that "it would have been safer to

have inspected the grand jury testimony," it nevertheless affirmed the denial of *in camera* inspection, stating that "inasmuch as the witnesses were thoroughly and competently cross-examined on numerous other relevant judicial and extra-judicial statements without manifest inconsistency, it is safe to assume that the grand jury proceedings would not have disclosed anything of impeaching significance." (R. 396; 346 F. 2d 10, 18).

The ruling below is a misapplication of *Pittsburgh Plate Glass* v. *United States*, 360 U. S. 395. There, the Court stated (at 400) that the defense is entitled to inspect the relevant grand jury testimony of a prosecution witness if it shows "that a 'particularized need' exists for the minutes which outweighs the policy of secrecy."[37] The Court (at 401) expressly reserved the question as to whether a trial judge is "absolutely required" to honor a defense request that he examine the grand jury testimony of a prosecution witness and make it available to the defense if it is inconsistent with the trial testimony.

The ruling below, contrary to *Pittsburgh Plate Glass*, assumes that the production of grand jury testimony directly to the defense is never permissible,[38] and makes its own version of "particularized need" a prerequisite to *in camera* inspection.

In what follows, it is shown that (1) petitioners made the showing of "particularized need" required by *Pittsburgh Plate Glass* and hence were entitled to the grand jury testimony of the four witnesses, and (2) in any event, petitioners' alternative motions for *in camera* inspection were erroneously denied. Finally, it is urged that the

---

[37] The four dissenting Justices believed that the defense has an absolute right to the testimony and that no such showing is required.

[38] In accord with the court's earlier decisions in *Travis* v. *United States*, 269 F. 2d 928, 945-46, rev'd on other grounds, 364 U. S. 631; *Bary* v. *United States*, 292 F. 2d 53, 56.

"particularized need" requirement of *Pittsburgh Plate Glass* should be reconsidered in the light of the experience since it was enunciated.

A. Petitioners made the showing of "particularized need" required for the production of grand jury testimony directly to the defense.

Pittsburgh Plate Glass furnishes no specifics for the showing of "particularized need" which entitles the defense to have the grand jury testimony of a prosecution witness.[39] Several guidelines appear from the opinion, however.

We are told (at 400-01) that a showing of contradiction between the trial and grand jury testimony of the witness "would not, of course, be necessary." On the other hand, in concluding that the defense showing in that case was inadequate, the Court emphasized (at 398) that "proof of the conspiracy was overwhelming," apart from the evidence supplied by the witness whose grand jury testimony was sought. The Court also pointed out (*ibid*) that while this witness was the only one who testified to the making of the illegal agreement, the documentary evidence established that fact by "little less than proof positive."[40]

---

[39] The quoted phrase was taken from *United States* v. *Proctor & Gamble*, 356 U. S. 677, a civil anti-trust suit, in which the Court rejected the defendants' pre-trial demand for the complete minutes of a grand jury investigation of the alleged violation which was the subject of the civil proceeding. The Court stated (at 683), "We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like. Those are cases of particularized need where the secrecy of the proceedings is lifted discreetly and limitedly." (Ftn. omitted.) Since petitioners here, like the petitioner in *Pittsburgh Plate Glass*, requested the grand jury testimony for impeachment purposes, they presented a case of "particularized need" within the meaning of *Proctor & Gamble*. The term is evidently given a different meaning in *Pittsburgh Plate Glass*.

[40] But see the dissenting opinion, at 401, n. 1.

Thus, the Court indicated that a "particularized need" will be found to exist where the trial testimony of the witness on an important phase of the case supplies substantial evidence of guilt that is not merely cumulative. Again, the Court's statement (at 400) that, "Certainly, 'disclosure is wholly proper where the ends of justice require it,' "[41] may indicate that factors affecting the credibility of the witness and the reliability of his trial testimony likewise have a bearing on the existence of "particularized need".

In contrast to *Pittsburgh Plate Glass*, the showing in the present case satisfies these criteria of "particularized need" with respect to the four witnesses whose grand jury testimony was sought by petitioners.

1. It cannot be disputed that Mason, Fikes, Gardner and Locke were key prosecution witnesses. The testimony of each was essential to the government's case.[42]

As appears from the opinion below, the court relied almost entirely on four episodes in concluding that the existence of a conspiratorial agreement had been estab-

---

[41] Quoting from *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234.

[42] Aside from Lawrence, whose testimony we discuss *infra*, p. 42, the other witnesses were Bush, Petersen, and Moralez. Bush and Petersen, like Locke, gave testimony relating only to the pre-conspiracy period, mostly 1948. Bush merely identified the printed proceedings of Mine-Mill's 1948 Convention, showing that there was a difference about continuing the non-compliance policy and that he, as a delegate, supported the minority view that the policy should be changed while Dichter made a speech in support of the majority view—adherence to the policy. None of this was in dispute. Petersen testified that four of the petitioners (Dennis, Dichter, Skinner, and Travis) were Communists at the time, as he was, and as such, supported the non-compliance policy. Moralez, the only other witness for the prosecution, testified to nothing except the Communist Party membership of petitioner Skinner in the period 1952 to 1954.

Fikes—Fikes testified, as he had at the first trial, that in 1949 he was present at a meeting in Bessemer, Alabama, attended by Wilson, Lawrence, three others, and an official of the Communist Party (R. 213-18). The meeting discussed Mine-Mill's recent decision to comply with the Taft-Hartley Act and the letters of resignation from the Communist Party by certain Mine-Mill officers that compliance would necessitate.

The court below relied heavily on Fikes' testimony about this meeting as establishing that the resignations of the Mine-Mill officers from the Communist Party were not genuine and as implicating not only Wilson, but as we have seen, in proving the conspiratorial agreement. However, as the court below noted, there was a material difference between the accounts which Fikes gave at the two trials about what Wilson had said at the meeting. At the first trial, he quoted Wilson as saying that the letters of resignation "wouldn't mean anything and would be phoney". He did not repeat this at the second trial, or attribute to Wilson any statement to the effect that the resignations would be fictitious (R. 389; 346 F. 2d 10, 14). Instead, he put into the mouth of the Communist Party official the remark that the letters of resignation "would be on paper, only" (R. 216).[46] Furthermore, Lawrence (who had not testified at the first trial) did not corroborate either of Fikes' versions of the conversation, and his testimony contained no suggestion from any of the participants that the resignations would be spurious. On the contrary, Lawrence quoted Wilson as saying that "from this point on none of the Executive Officers . . . could have any connection with the Communist Party". (R. 248; 346 F. 2d 10, 14).

---

[46] In quoting from Fikes' testimony, the opinion below erroneously attributes this remark to Wilson (R. 390, n. 2; 346 F. 2d 10, 14, n. 2).

Accordingly, Fikes' story about this critical episode was suspect, to say the least. Moreover, his credibility was undermined by evidence that he had twice lied under oath about his membership in the Communist Party and had given untruthful testimony in other proceedings concerning his whereabouts in certain years. (R. 257-68).

Gardner—Gardner's unreliability as a witness was shown by his uncorroborated testimony about an important conversation he had with Travis in October, 1951, when Travis commented on the difficulty he had been having about getting into Canada. According to Gardner, Travis said that "a great deal of his problems" arose because his public resignation from the Communist Party "was recognized pretty much as a subterfuge to avoid prosecution under Taft-Hartley and most people accepted the fact that he was still in the Communist Party" (R. 281). Gardner's testimony on the first trial in 1959 about what Travis had said on this occasion was substantially the same, including the reference to the resignation as a "subterfuge" (Record on Appeal Below, 631).

In 1958 and in 1960, however, Gardner's testimony in other proceedings about what Travis had said on the occasion in 1951 was basically quite different. In 1958, when testifying against Travis in the case against the latter under Section 1001 (*supra*, p. 6, n. 6), Gardner quoted Travis as saying that his public resignation "was a mistake because it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that actually it was done merely to conform to the Taft-Hartley affidavits . . ." (269 F. 2d 928, 935). In 1960, when testifying in an administrative proceeding, Gardner quoted Travis as saying that "neither the American nor the Canadian authorities believed his resignation was genuine. . . ." (Record on Appeal Below, 632). On cross-examination the next day, all that Travis said about his difficulty in crossing the border,

according to Gardner, was that he believed it was "because of the public resignation that he had made from the Party. . . ." (*Id.*, 633).

In short, Gardner's version on the two trials in this case (1959 and 1963) as to what Travis had said in 1951 differed not only from the version he had given in 1958 but also from the two differing versions he gave on successive days in 1960. The need, therefore, of discovering what version Gardner had given to the grand jury in 1956 about this conversation in 1951 can scarcely be exaggerated. Cf. *Jencks* v. *United States*, 353 U. S. 657, 66.

3. Furthermore, Gardner, Fikes, and Mason had reason to be biased and prejudiced.

a. Fikes and Gardner were accomplices. Fikes, according to his own testimony and that of Lawrence, was a participant in the Bessemer meeting—the one episode in the case about which there was direct evidence concerning the change to compliance and the consequent resignations from the Party of Mine-Mill officers. Gardner's testimony showed that, as a Communist, he knew of the Party membership of all the petitioners and, from his conversation with Dennis in 1951, that the resignations from the Party had taken place, at least in form.[47]

---

[47] Gardner's testimony, then, shows him to be as culpable, if not more so, than any of the petitioners. The only evidence in the case that any petitioner knew that any other was a member during the alleged conspiracy was Gardner's testimony that he, Sanderson, Skinner, and two other persons attended a Party "meeting" in a hotel room in Denver in February, 1955. Sanderson and Skinner are the only petitioners who filed no affidavits during the indictment period and the purpose of the "meeting" was to discuss Gardner's activities as a union staff member in Montana, not compliance or the filing of affidavits (R. 303). Thus, on the one hand, only Gardner, according to his testimony, had reason to believe that the four petitioner-affiants (Dennis, Dichter, Travis, Wilson) may have filed false affidavits, while, on the other hand, there was no evidence in the case that any of the petitioners knew that any other who had filed affidavits was a Party member during the indictment period.

b. In addition, Fikes had been a paid informer for the FBI from 1953 until he testified on the first trial in 1959 (R. 222). As an informer, he had four conversations with Wilson in 1954 and 1955, and his testimony about the conversations was designed to show that Wilson was a Party member during that period (R. 222-28).

c. Gardner and Mason had reason to be prejudiced against Mine-Mill and petitioners. As a result of his factional difficulties as a staff member (R. 305), Gardner testified that he was "fired" in the spring of 1955 (R. 306). Mason, who had been a Mine-Mill Executive Board member, withdrew from Mine-Mill in 1953, advocated withdrawal from Mine-Mill by the local unions in Montana (his home base), and then led an unsuccessful effort in 1954 by a rival union to win the bargaining rights there in a Labor Board election (R. 158).

4. The nature of the evidence, coupled with the remoteness of the trial from the incriminating episodes, gave an uncommon dimension to petitioners' need for the grand jury testimony. The evidence, both of the existence of a conspiracy and of the participation of the individual petitioners, consisted entirely of testimony concerning oral statements of petitioners or of others in their presence, occasionally at meetings but most often in casual conversation. The testimony came from interested witnesses and was almost entirely uncorroborated. The trial took place in 1963, more than eight years after the last of these meetings and conversations and twelve years after the last of the most damaging statements (Dennis to Gardner in 1951) relied on to establish the conspiratorial agreement was said to have been made. Even assuming good faith and objectivity on the part of the four witnesses, their grand jury testimony in 1956 as to what was said in 1948—1955 was much more likely to be accurate than their recollections seven years later.[48]

---

[48] "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory." *Jencks* v. *United States*, 353 U. S. 657, 667.

All of the foregoing circumstances demonstrate that petitioners had a "particularized need" for the grand jury testimony of the four witnesses. The issue under *Pittsburgh Plate Glass, supra*, at 400, therefore, is whether the need which was shown "outweighs the policy of secrecy". Just as the defense need for grand jury testimony was far weightier here than in that case, so the countervailing interest in secrecy was much weaker. *Pittsburgh Plate Glass* (*ibid*) emphasized that if grand jury testimony were disclosed, "not only would the participation of the jurors be curtailed, but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused." And the Court added, "Especially is this true in anti-trust proceedings where fear of business reprisals might haunt both the grand juror and the witness."

Here, seven years elapsed between the sitting of the grand jury and the demand for the testimony. And meantime, the witnesses had appeared at two trials where they publicly recounted the events which were the subject of their grand jury testimony. Accordingly, there is no possible foundation for a supposition that disclosure of their testimony would operate as a deterrent to the grand jurors or witnesses either in this or in other cases. Again, this is not an anti-trust case. Petitioners had no means of reprisal against the witnesses or grand jurors and sought none.

Plainly, then, in this case the "particularized need" of petitioners outweighed the policy of secrecy.[49] The rule

---

[49] Four reasons have been advanced for grand jury secrecy. *Pittsburgh Plate Glass*, at 405 (dissenting opinion). Two of these are irrelevant here—to prevent the accused from escaping before arrest or from tampering with the witnesses, and to prevent disclosure of derogatory information against an accused who is not indicted. The third reason—to encourage grand jury witnesses to testify freely without fear of retaliation—is, as shown in the text, likewise irrele-

of *Pittsburgh Plate Glass*, therefore, required the production of the grand jury testimony of the four witnesses directly to the defense.

B. Even if not producible directly to the defense, the grand jury testimony should have been produced for *in camera* inspection by the trial court.

If the Court were to hold that petitioners' showing was insufficient to warrant production of the grand jury testimony directly to the defense, a reversal would still be required because of the denial of petitioners' alternative motions for the trial court's *in camera* inspection of the grand jury minutes for inconsistencies with the trial testimony of the witnesses. *Pittsburgh Plate Glass* (at 401) reserved consideration of the circumstances under which such motions should be granted. We believe that if the rule of that case is adhered to with respect to production directly to the defense, *in camera* inspection should be granted as of course. Under any reasonable standard, however, it was error to deny such inspection in the present case.

1. Motions for *in camera* inspection have been granted as of course in the Second Circuit for some years. *United States* v. *Spangelet*, 258 F. 2d 338; *United States* v. *Hernandez*, 282 F. 2d 71; *United States* v. *Giampa*, 290 F. 2d 83; *United States* v. *D'Angiolillo*, 340 F. 2d 453, 457, cert. den'd, 380 U. S. 955; *United States* v. *LaVallee*, 344 F. 2d 313, 314-315. The court below, in agreement with decisions

---

vant under the circumstances of this case. The fourth reason—to encourage free participation of the grand jurors by barring disclosure of their votes and comments—can readily be accommodated by deleting all such votes and comments from the minutes that are furnished petitioners, as the dissent in *Pittsburgh Plate Glass* suggests, 360 U. S. at 407.

in several other Circuits, applies the "particularized need" rule of *Pittsburgh Plate Glass* to such motions.[50]

The Second Circuit practice provides a measure of protection to the accused and invades the secrecy of the grand jury proceding only when the policy of secrecy is clearly overborne by the existence of inconsistencies between the grand jury and trial testimony of the witness. The practice in the Second Circuit appears to have occasioned the government no difficulties. Indeed, the government itself favored granting *in camera* inspection as of course until the reservation of the question in *Pittsburgh Plate Glass* led it to urge the "particularized need" requirement. Cf. *Pittsburgh Plate Glass* (at 408-09), and Brief for the United States (p. 20) in *United States* v. *Spangelet*, 258 F. 2d 338 (C. A. 2) with Brief in Opposition in the present case (pp. 14-15).

2. Even if *in camera* inspection is not to be absolutely required on motion of the defense, petitioners' showing of "particularized need" plainly required it in this

---

[50] *3rd Circuit: United States* v. *Boyance*, 329 F. 2d 372, cert. den'd, *sub nom. Feldman* v. *United States*, 377 U. S. 965; *United States* v. *Bertucci*; 333 F. 2d 292, cert. den'd, *sub nom. Doherty* v. *United States*, 379 U. S. 839.

6th Circuit: United States v. *Bell*, 351 F. 2d 868, 875.

7th Circuit: United States v. *Micele*, 327 F. 2d 222, 226-27; *United States* v. *Keegan*, 331 F. 2d 257, 263.

8th Circuit: Berry v. *United States*, 295 F. 2d 192, 194-95, cert. den'd, 368 U. S. 955; *Brilliant* v. *United States*, 297 F. 2d 385, cert. den'd, 369 U. S. 871; *Hance* v. *United States*, 299 F. 2d 389.

The District of Columbia Circuit had granted *in camera* inspection when the testimony was of great importance, *Gordan* v. *United States*, 299 F. 2d 117, 313 F. 2d 582, cert. den'd, 374 U. S. 839; *Harrell* v. *United States*, 317 F. 2d 580, but most recently, has also expressed its rule in terms of "particularized need". *Frank* v. *United States*, 347 F. 2d 486, 490.

case.[51] Indeed, the court below stated that "it would have been safer to have inspected the grand jury testimony . . ." (R. 396; 346 F. 2d 10, 18). Without such an examination it is, of course, impossible to conclude that petitioners were not prejudiced by the trial judge's failure to adopt the "safer" course.[52] Nevertheless, the court was "unwilling to say the trial court committed reversible error by refusing the *'in camera'* inspection" (R. 396; 346 F. 2d 10, 18).

The justification for this ruling was that no "manifest inconsistency" had been shown between the testimony of the witnesses and their prior statements. This is inaccurate because, as we have seen, Locke, Fikes and Gardner were shown to have made prior inconsistent statements. It is also irrelevant because the significant impeachment of a witness by other means might well lessen the need for his grand jury testimony, not make it more acute. Indeed, in *Parr* v. *United States*, 265 F. 2d 894, 903 (C. A. 5), rev'd on other grounds (363 U. S. 370), direct production, and in *Simmons* v. *United States*, 308 F. 2d 324, 325-26 (C.A.D.C.), *in camera* inspection, were denied because the witness had already been sufficiently impeached.

---

[51] The fact that the witnesses were important would have entitled petitioners to *in camera* inspection in the District of Columbia Circuit, *supra*, p 48, n. 50. And that fact plus the fact that Fikes and Gardner were accomplices would have required the trial court to inspect their testimony in the Seventh Circuit. *United States* v. *Micele*, 327 F. 2d 222, 226-27.

[52] Strangely enough, in *Travis* v. *United States*, 269 F. 2d 928, rev'd on other grounds, 364 U. S. 631, Chief Judge Murrah, author of the opinions in the present case, dissented from the denial of *in camera* inspection on the ground (269 F. 2d at 946-47) that "there was no conceivable way of showing a particularized need unless the accused could get the grand jury testimony before the court".

C. The "particularized need" requirement of *Pittsburgh Plate Glass* should be reconsidered.

1. In *Pittsburgh Plate Glass*, the Court for the first time enunciated the principle that, under some circumstances, the grand jury testimony of a prosecution witness should be furnished directly to the defense for impeachment purposes. The enunciation of this principle, however, has not been followed by its implementation in the lower federal courts. Instead, the decision has become the authority for denying production of grand jury testimony to the defense.[53] Moreover, in those Circuits which make "particularized need" a prerequisite for *in camera* inspection, the effect of *Pittsburgh Plate Glass* has been to place severe limitations on this means of access to relevant grand jury testimony.[54]

Thus, experience since *Pittsburgh Plate Glass*, as exemplified by the present case, has confirmed the fear of the dissenting Justices (360 at 403) that "as a practical matter" the decision would foreclose defense access to grand jury testimony "even when the possible prejudice to the

---

[53] In *De Binder* v. *United States*, 292 F. 2d 737 (C. A. D. C.), production to the defense was approved, but thereafter the same court has sanctioned only *in camera* inspection, *supra*, p. 48, n. 50. Otherwise, the courts have uniformly denied production directly to the defense. *Parr* v. *United States*, 265 F. 2d 894 (C. A. 5), rev'd on other grounds, 363 U. S. 370; *United States* v. *Killian*, 275 F. 2d 561, 571-72 (C. A. 7), rev'd on other grounds, 368 U. S. 231; *United States* v. *Coduto, et al.*, 284 F. 2d 464, cert. den'd, 368 U. S. 955 (C. A. 7); *United States* v. *Nasser*, 301 F. 2d 243 (C. A. 7); *United States* v. *Smith*, 335 F. 2d 898 (C. A. 7); *Ogden* v. *United States*, 303 F. 2d 724, 741-42 (C. A. 9); *Travis* v. *United States*, 269 F. 2d 928 (C. A. 10), rev'd on other grounds, 364 U. S. 631; *Bary* v. *United States*, 292 F. 2d 53 (C. A. 10).

[54] Among the cases cited *supra*, p. 48, n. 50, only two in the District of Columbia Circuit (*Gordan* v. *United States*; *Harrell* v. *United States*) and one in the Seventh (*United States* v. *Micele*) have held that the trial court should have made the inspection.

accused in a criminal case is crystal clear and none of the reasons justifying secrecy is present."

2. Paradoxically, *Pittsburgh Plate Glass* and *Proctor & Gamble* have been the authorities relied upon in a growing number of civil anti-trust cases to make grand jury testimony in antecedent criminal cases available for discovery purposes. *Atlantic City Electric Company, et al.* v. *A. B. Chance Company, et al.*, 313 F. 2d 431 (C. A. 2);[88] *Allis-Chalmers Mfg. Co.* v. *City of Fort Pierce*, 323 F. 2d 233 (C. A. 5); *U. S. Industries, Inc.* v. *United States District Court*, 345 F. 2d 18 (C. A. 9); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 194 F. Supp. 763 (D. Mass.); *Commonwealth Edison, et al.* v. *Allis-Chalmers Mfg. Co., et al.*, 211 F. Supp. 729 (N. D. Ill.); *Consolidated Edison Co.* v. *Allis-Chalmers Mfg. Co., et al.*, 217 F. Supp. 36 (S. D. N. Y.); *United States* v. *Badger Paper Mills, Inc.*, 243 F. Supp. 443 (E. D. Wis.); *In re Sellers*, 32 F. R. D. 473 (N. D. Ill.).

In civil anti-trust cases, then, the tendency to make grand jury testimony available, even before trial, is growing steadily—despite the Court's observation in *Pittsburgh Plate Glass*, at 400, that in anti-trust cases "fear of business reprisal might haunt" the witness before the grand jury if he knew his testimony would be disclosed. But in criminal cases, as we have seen, the policy of secrecy is still almost absolute, even after the witness has testified, in face of the principle that "evidence relevant and material to his defense" should be made available to the accused, *Jencks*, 353 U. S. 657, 667, and even though in a criminal case the interest of the government is not to win but to see that justice is done. *Berger* v. *United States*, 295 U. S. 78, 88.

---

[88] In the *Chance* case, Justice Harlan denied a stay pending certiorari because, he said, in view of *Proctor & Gamble* and *Pittsburgh Plate Glass*, there was no reasonable expectation that certiorari would be granted. 10 L. ed. 2d 122, 83 Sup. Ct. 964.

3. Moreover, experience has fortified the view of the dissenters in *Pittsburgh Plate Glass* that *in camera* inspection of grand jury minutes by the trial judge can never be a satisfactory substitute for production of the relevant testimony directly to the defense. 360 U. S. at 408-09. In the first place, as the remarks of the trial judge in the present case reveal, examination of the minutes for inconsistencies with the trial testimony is a trying and time-consuming task which prolongs the trial and places a burden on a busy judge which he is understandably loathe to assume.[56] Furthermore, the cases underscore the truth of the observation in the dissenting opinion (at 410) that, "it will be extremely difficult for even the most able and experienced trial judge under the pressure of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness".[57] See *United States* v. *Spangelet*, 258 F. 2d 338; *United States* v. *Zborowski*, 271 F. 2d 661; *United States* v. *McKeever*, 271 F. 2d 669, in each of which the Court of Appeals for the Second Circuit found inconsistencies which had escaped the trial judge. And when inconsistencies are found, judges will differ as to whether they are useful for impeachment. Thus,

---

[56] Before finally ruling on the first of petitioners' production motions, the trial judge stated: "I am not deciding whether I am going to examine them *in camera* or not. I would like to see the bulk of them and so forth, because, gentlemen, we can either stretch this trial out for three or four months, or we can handle it within a few weeks . . . I am not going to spend my nights reading FBI statements or Grand Jury minutes. I am going to rest, because I am tired after one of these days . . . I don't think there has been a need shown and if the task doesn't appear to be too burdensome or too onerous, I would be willing to read them, but if I find I have got to read volumes and volumes, I am not going to do it until a higher Court tells me I have to" (R. 65-66).

[57] In the opinion below in *Pittsburgh Plate Glass*, Chief Judge Sobeloff made similar observations and also pointed out that to impose this task on the trial judge draws him "too deeply into the partisan task of preparing the cross-examination". 260 F. 2d 397, 404.

in *Gordan* v. *United States*, 313 F. 2d 582 (C.A.D.C.), cert. den'd, 374 U. S. 839, the majority thought the trial judge correct in finding no inconsistencies which might have been useful to the defense, but Chief Judge Bazelon, dissenting, found nine of them (313 F. 2d at 583-85).

Accordingly, we believe that the "particularized need" requirement of *Pittsburgh Plate Glass* should be reconsidered [58] and that the relevant grand jury testimony of a prosecution witness should be made available to the defense on its request, as is now the case under 18 U. S. C. 3500 with relevant prior statements of the witness to other agencies of the government.[59]

CONCLUSION

It is respectfully submitted that the judgment of the court below should be reversed.

TAYLOR, SCOLL, FERENCZ & SIMON,
200 Park Avenue,
New York, N. Y. 10017.

NATHAN WITT,
P. O. Box 156,
New York, N. Y. 10023.

GEORGE J. FRANCIS,
670 Capitol Life Center,
Denver, Colorado 80203.
Attorneys for Petitioners.

TELFORD TAYLOR,
of Counsel.

---

[58] There has been critical comment on the *Pittsburgh Plate Glass* decision. See, *e.g.*, Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 Calif. L. Rev. 56, 68-71 (1961); *Traynor, Ground Lost and Found in Criminal Discovery*, 39 N. Y. U. L. Rev. 229, 232-33 (1964), citing other critiques, 232, n. 20.

[59] It should be observed that a troublesome issue which Section 3500 has generated, that is, whether a particular document is a "statement" as defined in subsection (e), does not of course arise in connection with grand jury testimony.

APPENDIX

Statutes Involved

CONSTITUTION OF THE UNITED STATES:

Art. I, Sec. 9, Cl. 3 provides: No Bill of Attainder or *ex post facto* Law shall be passed.

The First Amendment provides: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment provides, in pertinent part: No person shall ——— be deprived of life, liberty, or property, without due process of law; ———.

STATUTES:

1. 18 U. S. C. 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2. 18 U. S. C. 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false,

fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

3. 29 U. S. C. 159(h) (Section 9(h) of Taft-Hartley) provided [1]:

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit, executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 287, 1001, 1022 and 1023 of Title 18 shall be applicable in respect to such affidavits.

4. 29 U. S. C. 504 (Section 504 of the Labor-Management Reporting and Disclosure Act of 1959) provides, in pertinent part:

(a) No person who is or has been a member of the Communist Party . . . . shall serve ———

---

[1] Repealed by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525.

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization . . . during or for five years after the termination of his membership in the Communist Party . . . . .

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

COPY

FILED
MAR 2 51966
JOHN F. DAVIS, CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 502

RAYMOND DENNIS, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF AMICI CURIAE ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AMALGAMATED CLOTHING WORKERS OF AMERICA, AMALGAMATED MEAT CUTTERS, AMERICAN FEDERATION OF TEACHERS, INTERNATIONAL TYPOGRAPHICAL UNION, NATIONAL FARMERS UNION, TRANSPORT WORKERS UNION, UNITED AUTOMOBILE WORKERS, AND UNITED PACKINGHOUSE WORKERS

MORRIS E. LASKER
WILLIAM B. GOULD
280 Park Avenue
New York, N. Y.

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.
Attorneys for
American Civil Liberties Union

JACOB SHEINKMAN
15 Union Square West
New York, N. Y.
Attorney for
Amalgamated Clothing Workers

JOSEPH M. JACOBS
201 N. Wells Street
Chicago, Illinois
Attorney for
Amalgamated Meat Cutters

JOHN LIGTENBERG
134 N. La Salle St.
Chicago, Illinois
Attorney for
American Federation of Teachers

GERHARD P. VAN ARKEL
1730 K St., N.W.
Washington, D. C.
Attorney for
International Typographical Union

CHARLES F. BRANNAN
Farmers Building
Denver, Colorado
Attorney for
National Farmers Union

JOHN F. O'DONNELL
501 Fifth Avenue
New York, N. Y.
Attorney for
Transport Workers Union

JOSEPH L. RAUH, JR.
1625 K St., N.W.
Washington, D. C.
Attorney for
United Automobile Workers

EUGENE COTTON
105 W. Adams St.
Chicago, Illinois
Attorney for
United Packinghouse Workers

TABLE OF CONTENTS

	PAGE
Interest of Amici	1
Statement of the Case	3
ARGUMENT	
I. Section 9(h) is unconstitutional as a Bill of Attainder	4
II. Section 9(h) is unconstitutional under the First and Fifth Amendments	9
III. Petitioner's motions for the production of the Grand Jury testimony of key prosecution witnesses were erroneously denied	12
CONCLUSION	13

TABLE OF AUTHORITIES

Cases

American Communications Association v. Douds, 339 U. S. 382 ..... 6, 7, 9

Aptheker v. Secretary of State, 378 U. S. 500 ..... 10, 11

Bates v. Little Rock, 361 U. S. 516 10

Dennis v. United States, 302 F. 2d 5 3

Louisiana v. NAACP, 366 U. S. 293 10

PAGE

NAACP v. Alabama, 357 U. S. 449 10
NAACP v. Button, 371 U. S. 415 10

Pittsburgh Plate Glass v. United States, 360 U. S. 395 12

Scales v. United States, 367 U. S. 203 10
Shelton v. Tucker, 364 U. S. 479 10
Staub v. City of Baxley, 355 U. S. 313 10

Thomas v. Collins, 323 U. S. 516 10

United States v. Brown, 381 U. S. 437 ..... 2, 4, 5, 6, 7, 8, 9
United States v. Lovett, 328 U. S. 303 ..... 6, 7

Yates v. United States, 367 U. S. 290 10

Constitution

Constitution of the United States:
First Amendment 4, 9, 11
Fifth Amendment 4, 9, 11

Statutes

18 U. S. C. 371 3

Section 9(h) of the Taft-Hartley Act, 29 U. S. C. 159(h) 2, 3, 4, 5, 6, 7, 8, 9, 11

Section 504 of the Labor-Management Reporting and Disclosure Act (73 Stat. 519) 2, 4, 5, 7, 8

In the

Supreme Court of the United States

October Term, 1965

No. 502

Raymond Dennis, *et al.*,

Petitioners,

—v.—

United States of America,

Respondent.

BRIEF AMICI CURIAE ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AMALGAMATED CLOTHING WORKERS OF AMERICA, AMALGAMATED MEAT CUTTERS, AMERICAN FEDERATION OF TEACHERS, INTERNATIONAL TYPOGRAPHICAL UNION, NATIONAL FARMERS UNION, TRANSPORT WORKERS UNION, UNITED AUTOMOBILE WORKERS, AND UNITED PACKINGHOUSE WORKERS

Interest of Amici*

The American Civil Liberties Union is a private, non-partisan organization engaged solely in the preservation and defense of the Bill of Rights. The National Farmers Union is an independent association of family farmers within the United States. The Amalgamated Clothing Workers, Amalgamated Meat Cutters, American Federation of Teachers, International Typographical Union, Transport Workers Union, United Automobile Workers, and United Packinghouse Workers are international trade

*This brief is filed with the consent of the parties. The letters of consent have been filed with the Clerk of the Court.

unions affiliated with the labor federation known as the AFL-CIO.

Each of the amici believe that Section 9(h) of the Taft-Hartley Act, the statute upon which the convictions in this case rest, is unconstitutional. That statute, prior to its repeal in 1959, foreclosed a trade union's access to the services of the National Labor Relations Board if its officers did not file affidavits of non-membership or affiliation with the Communist Party.

Amici are especially interested in this case because they are opposed to government-imposed loyalty tests, both in general and as a pre-requisite for holding office or employment in a private organization. They are opposed in particular to such tests as a condition for the receipt of a benefit otherwise made freely available by statute.

It is the belief of each of the amici that a mature trade union movement is capable of determining its own internal policies without the kind of governmental compulsion reflected either in Section 9(h) or in its successor statute, Section 504 of the Labor-Management Reporting and Disclosure Act, which was held unconstitutional in *United States* v. *Brown*, 381 U. S. 437.

Statement of the Case

The petitioners, all of whom were or had been officers or staff employees of the International Union of Mine, Mill and Smelter Workers, were indicted in 1956 for conspiring to defraud the United States government in violation of the fraud clause of the general conspiracy statute, 18 U. S. C. 371. The gravamen of the indictment charged that petitioners conspired to defraud the government by falsely denying that they were members of or affiliated with the Communist Party, as required by Section 9(h) of the Taft-Hartley Act, repealed in 1959. The affidavits in question were filed from 1949 to 1955. The testimony at trial concerned acts by individual defendants over a period of seven years and in such diverse locations as Cleveland, Ohio, Bessemer, Alabama, and Denver, Colorado. At least one of the government witnesses was a co-conspirator whose nolo contendere plea was then under advisement.

Petitioners' convictions at their first trial in 1959 were reversed on appeal. *Dennis* v. *United States*, 302 F. 2d 5 (10th Cir., 1962). Their subsequent conviction on retrial was affirmed 346 F. 2d 10 (10th Cir., 1965).

ARGUMENT

I.

Section 9(h) is unconstitutional as a Bill of Attainder.

Section 9(h) of Taft-Hartley Act, 29 U. S. C. 159(h), had "conditioned a union's access to the National Labor Relations Board upon the filing of affidavits by all of the union's officers attesting that they were not members of or affiliated with the Communist Party." *United States* v. *Brown*, 381 U. S. 437.

In 1959, Congress enacted the Labor-Management Reporting and Disclosure Act (73 Stat. 519), Section 504 of which "was enacted to replace Section 9(h) of the Taft-Hartley Act." *United States* v. *Brown*, *supra*, at 439. Section 504 made it a crime for a member of the Communist Party to serve as an officer or as an employee of a labor union. By Section 201(d) of the Act, Section 9(h) of Taft-Hartley was simultaneously repealed.

> "Section 504 (of the Act of 1959) was designed to accomplish the same purpose as Section 9(h), but in a more direct and effective way. H. R. Rep. No. 741, 86th Cong. 1st Sess., p. 36." *United States* v. *Brown*, *supra*, at 439, n. 2.

In 1961, Archie Brown, a member of the Executive Board of Local 10 of the International Longshoremen's and Warehousemen's Union, was indicted and convicted for violating Section 504. His conviction was reversed by the Court of Appeals for the Ninth Circuit, sitting en banc, on the ground that Section 504 violated the First and Fifth Amend-

ments to the Constitution. This Court granted certiorari and affirmed the reversal of the conviction on the ground that Section 504 was unconstitutional as a Bill of Attainder. We contend here that the Court's conclusion in *Brown* that Section 504 of the 1959 Act was "enacted to replace Section 9(h) of the Taft-Hartley Act," and "was designed to accomplish the same purpose as Section 9(h)," in conjunction with its holding that Section 504 was unconstitutional, compels the conclusion that Section 9(h) of Taft-Hartley is constitutionally invalid for the following reasons.

With Section 9(h), as with Section 504, the Constitution's proscription of bills of attainder has been violated. Therefore, this Court's reasoning in *Brown* applies with equal vigor to the instant case.

Mr. Chief Justice Warren expressed the basis for the unconstitutionality of Section 504 in the following language:

> "The statute does not set forth a generally applicable rule declaring that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party." *United States* v. *Brown, supra* at 450.

Accordingly, this Court noted that in *Brown* it "was neither charged nor proven that Respondent at any time

advocated or suggested illegal activity by the union, or performed a political strike." *United States* v. *Brown*, *supra* at 440.

Any doubt about this matter is completely dispelled by the fact that both statutes seek to deal with "membership" in the "Communist Party" and to penalize union officers who fall within the offending category. Thus, this Court said the following in *U. S.* v. *Brown*, *supra*, at 450, n. 24:

> "We of course take no position on whether or not members of the Communist Party are in fact likely to incite political strikes. *The point we make is rather that the Constitution forbids Congress from making such determinations.*" (Emphasis supplied.)

Second, this Court in *Brown* severely eroded the foundation of *American Communications Association* v. *Douds*, 339 U. S. 382, which upheld the constitutionality of Section 9(h), by finding that its reading of *United States* v. *Lovett*, 328 U. S. 303 was erroneous:

> "We think that the Court in Douds misread *United States* v. *Lovett* when it suggested, 339 U. S. at 413, that that case should be distinguished on the ground that sanction there imposed was levied for purely retributive reasons." *United States* v. *Brown*, *supra*, at 460.

Since the *Douds'* view that the absence of retribution in 9(h)—that is, the absence of the application of that provision to former members of the Communist Party—was determinative of the question whether 9(h) was punitive, has been rejected, the conclusion that a very significant portion of the *Douds* rationale is mistaken, or at best irrelevant, must follow. For it was the very absence of this kind of

retribution in 9(h) which permitted *Douds* to avoid this Court's previous decisions and thus leave that provision intact. It is particularly important here, of course, that the treatment by the *Douds* decision of both *Lovett* and the question of retribution took place within the discussion of Section 9(h)'s constitutionality under the Bill of Attainder Clause.

Indeed, this Court in *Brown* noted that *Douds* merely attempted "to prove its assertion that Section 9(h) was prohibitive rather than retributive in purpose. . . ." *Brown* was quite explicit in limiting this "assertion" to *Douds* itself. *Brown* clearly minimized the differences between 9(h) and 504:

> ". . . even if we make the assumption that the five year provision was inserted *not out of desire to visit retribution but purely out of a belief that failure to include it would lead to pro forma resignations from the Party which would not decrease the threat of political strikes,* it still clearly appears that Section 504 inflicts 'punishment' within the meaning of the Bill of Attainder Clause. It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes, retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crime is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." (Emphasis supplied.)

Though this Court in *Brown* distinguished *Douds* as "not necessarily controlling," pointing out that under Section 9(h) Communist Party members could escape from the specified class simply through resignation, it nevertheless left open to attack the weight accorded this factor in *Douds*:

"We do not read either opinion (*Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1, or *Douds*) to have set up inescapability as an absolute pre-requisite to a finding of attainder. Such an absolute rule would have flown in the face of explicit precedent, *Cummings* v. *Missouri*, 4 Wall. 277, 324, as well as the historical background of the constitutional prohibition." *United States* v. *Brown, supra*, at 457, n. 32.

Third, it should also be noted that this Court, in striking down Section 504, viewed its purpose as "preventive" and similar to those of a number of English bills of attainder. This Court said that both the former and the latter were the result of legislative judgments " . . . based largely on past acts and association . . . that a given person or group was likely to cause trouble (usually, overthrow the government) and therefore inflicted deprivation upon that person or group in order to keep them from bringing about the feared event." *United States* v. *Brown, supra*, at 458-459. Not only does this description perfectly fit Section 9(h), but the Court also suggested that Section 9(h) as construed in *Douds*, Section 504, and several early English and American bills of attainder, had similar legislative histories. *United States* v. *Brown, supra*, at 458-460. Truly, Section 9(h) is the " . . . legislative punishment, of any form or severity, of specifically designated persons or groups" to which this Court pledged unceasing hostility in *Brown*.

Finally, four Justices of this Court subscribe to the following viewpoint articulated in Mr. Justice White's dissenting opinion in *Brown*:

"*American Communications Assn.* v. *Douds*, 339 U. S. 382, which upheld the predecessor statute to Sec. 504

is obviously overruled. . . . The Bill of Attainder Clause now forbids Congress to do precisely what was validated in *Douds*." *United States* v. *Brown*, *supra*, at 464-465.

We submit that the dissent's characterization of *Brown* is an accurate one. Here, as in *Brown*, disqualification of Union officers turns on their membership in the Communist Party. This is exactly what *Brown* condemns. Thus, for all the foregoing reasons, Section 9(h) must fail as a bill of attainder in the instant case.

II.

Section 9(h) is unconstitutional under the First and Fifth Amendments.

We contend that the Ninth Circuit's holding in *Brown* v. *United States*, 334 F. 2d 488, provides a further ground upon which these convictions should be reversed. More precisely, it is our position that Section 9(h) is an unconstitutional restraint on freedom of association and, as was said by the Ninth Circuit in *Brown*, ". . . The relationship between the conduct or status punished and the evil maintained here to be prevented is not sufficiently gross or substantial to meet the requirements of either the First or Fifth Amendments. . . ." 334 F. 2d at 496. Thus, to the extent that *Douds* upheld Section 9(h) of Taft-Hartley against the First Amendment challenge, we ask the Court to overrule *Douds* on substantially the same grounds relied upon by the Ninth Circuit. We believe that this case is controlled by the line of decisions which flow from the freedom

of association doctrine enunciated in *NAACP* v. *Alabama*, 357 U. S. 449, 460 (1958).

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."

Accord, *Bates* v. *Little Rock*, 361 U. S. 516; *Shelton* v. *Tucker*, 364 U. S. 479; *Louisiana* v. *NAACP*, 366 U. S. 293; *NAACP* v. *Button*, 371 U. S. 415. See also *Staub* v. *City of Baxley*, 355 U. S. 313, *Thomas* v. *Collins*, 323 U. S. 516 which both upheld constitutional rights of union organizers.

In the instant case, as in *Aptheker* v. *Secretary of State*, 378 U. S. 500, there is no established relationship between the statute and the objectives which it attempts to achieve. Here, as in *Aptheker*, the statute "renders irrelevant the member's degree of activity in the organization and his commitment to its purpose." Cf. *Yates* v. *United States*, 367 U. S. 290, 299; *Scales* v. *United States*, 367 U. S. 203.

Moreover, Section 9(h) presents a more severe limitation on First and Fifth Amendment rights than did *Aptheker* for the latter case was concerned only with the passport rights of *individuals*. Here one is not concerned with the impingement on association of union officials *alone*. Also presented is the deprivation of the union member's right to freely elect leaders of his own choosing and, perhaps more important, the consequent withdrawal of rights for all members and employees within the bargaining unit which are normally enjoyed under the National Labor Relations Act.

The fact is that no attempt has ever been made to treat union officials who are members of the Communist Party on an individual basis under Section 9(h). Thus, the instant case presents this Court with a statute even more oppressive than that involved in *Aptheker*. The liberties at issue in this case are of equal importance at the very least.

Accordingly, the judgment must be reversed on the ground that Section 9(h) is unconstitutional under the First and Fifth Amendments.

III.

Petitioner's motions for the production of the Grand Jury testimony of key prosecution witnesses were erroneously denied.

As Petitioner has pointed out in its Brief (pp. 36-53) none of the factors alluded to in *Pittsburgh Plate Glass* v. *United States*, 360 U. S. 395, which argues for the suppression of testimony are present in this case. Thus, the encouragement of witnesses to testify freely without fear—the only relevant consideration under which secrecy could outweigh the "particularized need" which *Pittsburgh Plate Glass* requires of the Defendant—need not be of concern in this case. Seven years and two trials have passed by between the sitting of the Grand Jury and the demand for the testimony. We agree with Petitioners' statement at page 46 of their Brief: "... There is no possible foundation for a supposition that disclosure of their testimony would operate as a deterrent to the grand jurors or witnesses, either in this or in other cases...."

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

MORRIS E. LASKER
WILLIAM B. GOULD
230 Park Avenue
New York, N. Y.

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.
Attorneys for
American Civil Liberties Union

JACOB SHEINKMAN
15 Union Square West
New York, N. Y.
Attorney for
Amalgamated Clothing Workers

JOSEPH M. JACOBS
201 N. Wells Street
Chicago, Illinois
Attorney for
Amalgamated Meat Cutters

JOHN LIGTENBERG
134 N. La Salle St.
Chicago, Illinois
Attorney for
American Federation of Teachers

GERHARD P. VAN ARKEL
1730 K St., N.W.
Washington, D. C.
Attorney for
International Typographical Union

CHARLES F. BRANNAN
Farmers Building
Denver, Colorado
Attorney for
National Farmers Union

JOHN F. O'DONNELL
501 Fifth Avenue
New York, N. Y.
Attorney for
Transport Workers Union

JOSEPH L. RAUH, JR.
1625 K St., N.W.
Washington, D. C.
Attorney for
United Automobile Workers

EUGENE COTTON
105 W. Adams St.
Chicago, Illinois
Attorney for
United Packinghouse Workers

March, 1966

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Questions presented	3
Statement	4
Summary of argument	8
Argument	12
I. The indictment properly charged a conspiracy to defraud the United States	12
A. Although it was part of petitioners' conspiracy to commit statutory offenses, they could properly be charged with conspiring to defraud the United States	12
B. Petitioners' conspiracy involved fraud because they agreed to make material misrepresentations and thereby obtain services to which they were not entitled	18
C. If there was error in charging petitioners, it was nonprejudicial	22
II. Petitioners' convictions are not invalid on constitutional grounds	24
A. Petitioners' convictions for conspiring to defraud the government are valid irrespective of the constitutionality of Section 9(h)	26
B. Section 9(h) is neither a bill of attainder nor an impermissible infringement on First and Fifth Amendment liberties	33
III. The district court's rulings on petitioners' motions regarding witnesses' grand jury testimony did not constitute reversible error	38
A. Defendants have no absolute right to examine a witness' grand jury testimony	39

212-183—66——1

Argument—Continued
III. The district court's rulings etc.—Continued
B. Whether to examine grand jury minutes "in camera" is a discretionary decision to be made by the trial court on an evaluation of all the circumstances... Page 42
C. In the circumstances of this case, the judge's refusal to examine the grand jury minutes "in camera" was not error... 44
D. If this Court disagrees with the court of appeals' evaluation of the effect of the district court's ruling, it should permit the district judge now to examine the grand jury testimony "in camera"... 51
Conclusion... 52

CITATIONS

Cases:

American Communications Association v. *Douds*, 339 U.S. 382... 25, 29, 33, 34
Aptheker v. *Secretary of State*, 378 U.S. 500... 10, 33, 35, 36, 37
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288... 32
Boehm v. *United States*, 123 F. 2d 791, certiorari denied, 315 U.S. 800... 28
Braverman v. *United States*, 317 U.S. 49... 23
Bridges v. *United States*, 346 U.S. 209... 8, 15, 16, 17
Brown v. *Elliot*, 225 U.S. 392... 17
Campbell v. *United States*, 365 U.S. 85... 52
Carter v. *Texas*, 305 U.S. 557, dismissing appeal from 135 Tex. Crim. 457, 116 S.W. 2d 371... 28
Culp v. *United States*, 131 F. 2d 93... 18
Fahey v. *Mallonee*, 332 U.S. 245... 32
Frohwerk v. *United States*, 249 U.S. 204... 23
Glasser v. *United States*, 315 U.S. 60... 13, 14
Glickstein v. *United States*, 222 U.S. 139... 27
Grunewald v. *United States*, 353 U.S. 391... 18
Hagner v. *United States*, 285 U.S. 427... 23
Hammerschmedt v. *United States*, 265 U.S. 182... 18, 19, 21
Hills v. *United States*, 97 F. 2d 710... 28
Huff v. *United States*, 192 F. 2d 911, certiorari denied, 342 U.S. 946... 17
Jencks v. *United States*, 353 U.S. 657... 39

Cases—Continued

	Page
Kay v. *United States*, 303 U.S. 1	29, 30, 31, 32
Leedom v. *International Union of Mine, Mill and Smelter Workers*, 352 U.S. 145	19, 20, 21, 50
Lutwak v. *United States*, 344 U.S. 604	14, 21, 22
Madden v. *United States*, 80 F. 2d 672	28
Mattox v. *United States*, 156 U.S. 237	50
May v. *United States*, 175 F. 2d 994, certiorari denied, 338 U.S. 830	23
National Labor Relations Board v. *Dant*, 344 U.S. 375	19
National Labor Relations Board v. *Highland Park Co.*, 341 U.S. 322	19
Ogden v. *United States*, 303 F. 2d 724	28
Pittsburgh Plate Glass Co. v. *United States*, 360 U.S. 395, affirming 260 F. 2d 397	10, 39, 40, 42, 43
South Carolina v. *Katzenbach*, No. 22 Orig., decided March 7, 1966	34
United States v. *Barra*, 149 F. 2d 489	28
United States v. *Bramblett*, 348 U.S. 503	24
United States v. *Brown*, 381 U.S. 437	10, 33, 34, 35
United States v. *Butler*, 297 U.S. 1	30
United States v. *Debrow*, 346 U.S. 374	23
United States v. *Giampa*, 290 F. 2d 83	42, 51
United States v. *Gilliland*, 312 U.S. 86	24
United States v. *Hutcheson*, 312 U.S. 219	23
United States v. *Isthmian S. S. Co.*, 359 U.S. 314	41
United States v. *Johnson*, 165 F. 2d 42, certiorari denied, 342 U.S. 946	17
United States v. *Kapp*, 302 U.S. 214	29, 30, 31, 32
United States v. *Manton*, 107 F. 2d 834, certiorari denied, 309 U.S. 664	13, 14
United States v. *Meyer*, 140 F. 2d 652	28
United States v. *Micele*, 327 F. 2d 222	51
United States v. *Orta*, 253 F. 2d 312, certiorari denied, 357 U.S. 905	28
United States v. *Parker*, 244 F. 2d 943, certiorari denied, 355 U.S. 836	28
United States v. *Reina*, 242 F. 2d 302, certiorari denied *sub nom. Moccio* v. *United States*, 354 U.S. 913	17
United States v. *Remington*, 208 F. 2d 567, certiorari denied, 347 U.S. 913	27
United States v. *Rosenberg*, 245 F. 2d 870	40
United States v. *Schneider*, 45 F. Supp. 848	28

Cases—Continued

	Page
United States v. *Spangelet*, 258 F. 2d 338	51
United States v. *Williams*, 341 U.S. 58	27
United States v. *Winter*, 348 F. 2d 204, certiorari denied, 382 U.S. 955	23
Williams v. *United States*, 168 U.S. 382	22

Constitution, statutes and rules:

United States Constitution:	
First Amendment	25, 26
Fifth Amendment	25, 26, 36
Jencks Act, 18 U.S.C. 3500	40, 50
National Labor Relations Act, 49 Stat. 453, Sec. 9, as amended by the Labor-Management Relations Act of 1947, Sec. 9(h), 29 U.S.C. 159(h)	2, 3, 4, 6, 7, 8, 9, 10, 12, 18, 19, 20, 21, 24, 25, 26, 29, 32, 33, 34, 36, 47
Labor-Management Reporting and Disclosure Act of 1959, Sec. 201(d), 73 Stat. 525	3
5 U.S.C. 118(i)	34
18 U.S.C. 371	2, 3, 4, 12, 13, 17, 22, 23
18 U.S.C. 1001	2, 12, 23, 24
28 U.S.C. 458	34
Federal Rules of Criminal Procedure:	
Rule 6(e)	39, 41
Rule 7(c)	22
Rule 16(a)	41
Rule 31(c)	24

Congressional materials:

S. Rep. No. 981, 85th Cong., 1st Sess.	40
103 Cong. Rec. 15933	40

Miscellaneous:

Goldstein, *Conspiracy To Defraud the United States*, 68 Yale L.J. 405 (1959)	14

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 502

RAYMOND DENNIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 384–403) is reported at 346 F. 2d 10. The prior opinion of that court, reversing petitioners' convictions after their first trial (Pet. App. A2), is reported at 302 F. 2d 5. The opinion of the district court denying motions to dismiss the indictment (R. 8–16) is reported at 160 F. Supp. 787.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1965 (R. 404). A petition and two supplementary petitions for rehearing were denied on June 28, 1965 (R. 405–425). Mr. Justice White ex-

tended the time for filing a petition for a writ of certiorari to August 27, 1965, and the petition was filed on August 26, 1965. It was granted in part on November 15, 1965 (R. 427; 382 U.S. 915).

STATUTES INVOLVED

1. 18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2. 18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

3. Section 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations

Act of 1947 (formerly 29 U.S.C. (1958 ed.) 159(h)), which was repealed by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525, provided:

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit, executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of [sections 286, 287, 1001, 1022 and 1023 of Title 18] shall be applicable in respect to such affidavits.

QUESTIONS PRESENTED

1. Whether the indictment properly charged a conspiracy to defraud the United States under 18 U.S.C. 371.

2. Whether Section 9(h) of the Taft-Hartley Act (formerly 29 U.S.C. 159(h)) is constitutional.

3. Whether the trial court erred in denying peti-

tioners' motions for production, to the defense or to the Court, of grand jury testimony of prosecution witnesses.

STATEMENT

Four of the petitioners are or have been officers of the International Union of Mine, Mill and Smelter Workers ("Mine-Mill"); the other two are or have been members of Mine-Mill. They and eight others were charged in a one-count indictment returned on November 16, 1956, in the United States District Court for the District of Colorado, with conspiring to defraud the United States and an agency thereof—*i.e.*, the National Labor Relations Board ("NLRB")—in violation of 18 U.S.C. 371 by obtaining the services of the NLRB for Mine-Mill "without lawfully and in good faith qualifying" (R. 2) the union under Section 9(h) of the Labor Management Relations Act of 1947. The indictment alleged that petitioners, who were members of the Communist Party, had agreed together and with other conspirators to file with the NLRB false non-Communist affidavits and falsely to pretend to sever their associations with the Communist Party in order to obtain the benefits of NLRB services and facilities. It was also alleged that the conspirators had agreed to use the Board's services with knowledge of the falsity of their affidavits and of Mine-Mill's failure to comply with Section 9(h) (R. 1–6).

Petitioners' motion to dismiss the indictment for failure to state an offense under 18 U.S.C. 371 was denied by the trial court (R. 8–16). After a trial by jury, petitioners and three co-defendants were

convicted.[1] On appeal, petitioners' convictions were reversed because prejudicial hearsay had been admitted in evidence,[2] but the court of appeals affirmed the district court's denial of petitioners' motion to dismiss (302 F. 2d 5; Pet. App. 21a–36a). Petitioners were then retried and convicted.[3] Each was sentenced to three years' imprisonment and fined $2,000 (R. 22–28). The court of appeals affirmed all the convictions (R. 385–403).

The evidence showed that petitioners were members of the Communist Party and officers or staff members of Mine-Mill during the relevant period (R. 40–46, 49–51, 55–58, 60–63, 81–83, 92–101, 118–122, 129–130, 140–157, 184–188, 191–196, 204–207, 210–214, 222–228, 231–237, 245, 275–279),[4] that Mine-Mill and the Communist Party opposed compliance with Section 9(h) prior to 1949 (R. 123–126; Govt. Ex. 2, 3(a)); that the Party and the union changed their

[1] Three of the fourteen defendants named in the indictment had pleaded *nolo contendere* and were given suspended sentences. Two other defendants were acquitted at the first trial.

[2] The court instructed, however, that the indictment be dismissed against two of the defendants who had been found guilty (Pet. App. 36a).

[3] One co-defendant was acquitted by the jury at this second trial (R. 389).

[4] Raymond Dennis was an International Representative and later a board member; Irving Dichter was also an International Representative and later a board member; Harold Sanderson was a member of the office staff and served most of the relevant period as Assistant to the President; Albert Skinner was an International Representative and Director of the Political Action Committee; Maurice Travis was Secretary-Treasurer of the union until 1955; and Charles Wilson was an International Representative, then a board member, and later Vice-President for the Eastern States.

212-182—66——2

policies of opposition in that year (R. 129–132, 215–219; Govt. Ex. 6); and that, after this change of position, the petitioners, who were officers of Mine-Mill, submitted resignations to the Party and signed non-Communist affidavits in order to obtain for Mine-Mill the services of the NLRB (R. 216, 248, 278–281; Govt. Ex. 11, 13, 14, 15).

The evidence relating to the background of the conspiracy showed that, prior to June 1949, the Communist Party, acting through petitioners and others, played a dominant role in the affairs of Mine-Mill (*e.g.*, Travis, Dichter and Dennis, R. 48, 52–57; Wilson, R. 211, 237). For example, when Mine-Mill board member Kenneth Eckert, led a drive for compliance with Section 9(h) in 1948, petitioners Travis, Dennis, and Dichter, under the guidance of a Party leader who was not a member of Mine-Mill, were instrumental in having Eckert removed from union office (R. 40–47). At around the same time, all six petitioners attended Communist Party meetings, often presided over by Party officials who were not in Mine-Mill, at which various union problems were considered, particularly the threat to Communist control of Mine-Mill posed by Section 9(h) (R. 48–49, 52–57, 239–241, 213—218). The fear was that, as petitioner Travis stated on a number of occasions, "it would behead the union, to sign the non-Communist affidavits under the Taft-Hartley Act" (R. 41, 56–57). The decision that Mine-Mill would not comply with Section 9(h) was "made in the Party" (R. 124), and petitioners acted in accordance with the Party's policy.

The reversal of the policy of noncompliance also

emanated from Communist Party leadership. In the Spring of 1949, petitioner Travis informed witness William Mason that "the boys in the Party are considering changing our position" on Section 9(h) (R. 130; see also Wilson, R. 215–217, 243–244, 245–249). Shortly thereafter, the union's Executive Board, with petitioners Wilson and Sanderson in attendance, voted unanimously for compliance with the Act (R. 132–137). Thereupon, a rearrangement of the relationship of the Communist Mine-Mill officials to the Party was undertaken under the guidance of Party functionaries (Wilson, R. 213–218, 245–250; Dennis, R. 282–283). Petitioner Sanderson was given the job of coordinating the activities of Communists on Mine-Mill's staff, including the collection of Party dues (R. 250–251; see also R. 139–141). All Mine-Mill officials who were Communists, except petitioner Travis, who made a public announcement of resignation (R. 142–143, 145, 280–281), sent letters of resignation from the Party to local Party offices (*e.g.*, Wilson, R. 216–217, 254; Dennis, R. 278–279). As Travis subsequently admitted, his resignation "was recognized pretty much as a subterfuge to avoid prosecution under Taft-Hartley and most people accepted the fact that he was still in the Communist Party" (R. 281).

After the union voted to comply with Section 9(h), Communist control of its affairs, through petitioners and others, continued (*e.g.*, Skinner, R. 151; Sanderson R. 288–289). The Party dictated important decisions in the union's administration, including the selection of union officers and staff members (R. 61–62, 227, 272–

274, 277–278, 282–283) and even the employment of office workers (R. 284). As petitioner Dichter stated in 1955 to witness Gardner—whom he was investigating for the Party because of Gardner's opposition to petitioner Travis' policies—Mine-Mill was "one of the last real strongholds of the Party where the Party voice to the trade union movement could be heard" (R. 305; see also Skinner, R. 150–151; Travis, R. 154–155; Wilson, 157–158, 227, 286–287).

On several occasions after filing the affidavits called for by Section 9(h), petitioners sought and obtained for Mine-Mill the services of the National Labor Relations Board (Skinner, Govt. Ex. 18, 19; Dennis, Govt. Ex 20; Wilson, Govt. Ex. 21; Dichter, Govt. Ex. 22).

SUMMARY OF ARGUMENT

I

A. Petitioners were properly charged with having conspired to defraud the United States. The fact that their conspiracy may have included an agreement to commit substantive offenses did not preclude a prosecution for the kind of conspiracy which requires proof of fraud. *Bridges* v. *United States*, 346 U.S. 209, on which petitioners rely for the contrary proposition is inapposite because in that case the Court was merely construing the Suspension of Limitations Act, which, it determined, warranted "conservative interpretation." Moreover, *Bridges* involved nothing more than a conspiracy to commit substantive offenses. The present conspiracy con-

templated other conduct in addition to the commission of the offenses.

B. Petitioners were guilty of conspiring to defraud the government because they sought, by deceitful means, to obtain for their union services for which it was disqualified under Section 9(h) of the Labor Management Relations Act of 1947. The fact that, for reasons of efficient administration, the National Labor Relations Board was not given the power by Congress to determine the truth or falsity of affidavits submitted to it under Section 9(h) did not diminish petitioners' fraud. Their course of conduct was directed at frustrating the legislative will by dishonesty.

C. In any event, petitioners were not prejudiced by any flaw in the pleading. The indictment charged them with the crime of conspiracy—which is a single offense even if the agreement comprehends many illegal objectives—and it informed them of the details of the alleged offense. They were given due notice, and the body of the indictment certainly defined the offense with sufficient particularity to prevent any danger of double jeopardy. At best, petitioners' contention is that they were convicted of a conspiracy which is a lesser-included offense within the conspiracy to defraud with which they were charged. The variance between the allegation of a greater offense and the proof of a lesser included one is not prejudicial.

II

A. Petitioners could have challenged the constitutionality of Section 9(h) by refusing to file any affi-

davits with the National Labor Relations Board and then bringing an action to compel the Board to provide its services to Mine-Mill. Their constitutional claim did not, however, afford them a license to file false affidavits, and they may not defend against a prosecution based on the affidavits' falsity by challenging the constitutionality of the filing requirement. To permit such a belated challenge would be to place a premium on deception by inviting a first attempt falsely to evade the statute's operation.

B. In any event, Section 9(h) was not unconstitutional. It did not directly impose a criminal penalty on Communists holding union office, as did its successor, which was held unconstitutional in *United States* v. *Brown*, 381 U.S. 437. Nor was it an overboard infringement on a constitutionally protected liberty, as was the passport restriction declared unconstitutional in *Aptheker* v. *Secretary of State*, 378 U.S. 500.

III

A. Petitioners were not entitled, as of right, to examine the grand jury testimony of government witnesses. This Court so held in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, and there is no occasion to reconsider that decision in this case.

B. While it is generally the "safer" course for district judges to make an *in camera* inspection of a witness' grand jury testimony on demand by the defense, we do not believe an inflexible rule requiring such examination is desirable. Such a procedure imposes a serious burden on the court, and it should not be required unless the defense comes forward with

something more than a bare demand. In this case, we submit, although petitioners have made a substantial showing here, they failed to offer any justification to the district court.

C. The trial judge in this case expressed a readiness to examine grand jury minutes if a particularized showing was made. An analysis of the record demonstrates that although petitioners had other prior statements of the witnesses they made no effort to show the district judge why *in camera* examination was warranted. They relied instead on general assertions that inconsistencies were likely to be found. In these circumstances, the district judge acted within his discretion in denying the requests.

D. Should this Court disagree with the conclusion of the court of appeals regarding the district judge's refusal to examine the minutes *in camera*, it does not follow that the convictions must be reversed. Since petitioners have made a substantially greater showing here than in the district court, it would be more appropriate for this Court to remand the case to the trial judge for his examination of the grand jury minutes. Only if he certifies that there were material inconsistencies otherwise unknown to the defense should the convictions be reversed.

ARGUMENT

I

THE INDICTMENT PROPERLY CHARGED A CONSPIRACY TO DEFRAUD THE UNITED STATES

A. ALTHOUGH IT WAS PART OF PETITIONERS' CONSPIRACY TO COMMIT STATUTORY OFFENSES, THEY COULD PROPERLY BE CHARGED WITH CONSPIRING TO DEFRAUD THE UNITED STATES.

Petitioners were convicted under an indictment which charged them with having conspired "to defraud the United States and an agency thereof" (R. 2) by fraudulently effectuating compliance with Section 9(h) on behalf of Mine-Mill. They contend that since the gist of the alleged fraud was the filing, by the union's officers, of false non-Communist affidavits, and since Section 9(h) explicitly makes 18 U.S.C. 1001 (the false statements statute) applicable to the affidavits filed pursuant to the statute, a conspiracy centering on the filing of false affidavits can only be charged under the portion of 18 U.S.C. 371 which relates to conspiracies "to commit any offense against the United States" and not under the other portion of the conspiracy statute—making it a crime to conspire "to defraud the United States"—which was invoked in this case (Pet. Br. 11–17). This argument misapprehends the scope of the conspiracy statute and reads into it a limitation which is not warranted by either its purpose or its language.

The conspiracy statute—18 U.S.C. 371—subjects to criminal liability two kinds of conspiracies: (1) conspiracies "to commit any offense against the United

States" and (2) conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose" (p. 2, *supra*). Petitioners contend that the conspiracy alleged in the indictment and proved by the evidence could not be of the second variety because the acts done by the conspirators constituted an "offense against the United States" and the conspiracy could therefore have been charged under the first portion of 18 U.S.C. 371. This contention supposes, however, that the two provisions in 18 U.S.C. 371 are mutually exclusive—*i.e.*, that conduct which could be charged under the "offense" portion of the conspiracy statute may not be charged under the "fraud" portion even if it would otherwise qualify under the latter provision. The statute has consistently been applied contrary to petitioners' suggested interpretation, and nothing in its language justifies petitioners' restricted construction.

In *Glasser* v. *United States*, 315 U.S. 60, which involved a conviction for conspiracy to defraud the United States of the honest services of Assistant United States Attorneys who had demanded and obtained bribes, this Court, rejecting the contention that the indictment was defective because it charged "a conspiracy to commit a substantive offense requiring concerted action, namely, bribery," quoted with approval from *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664:

> The indictment does not charge as a substantive offense the giving or receiving of bribes; nor does it charge a conspiracy to give or accept bribes. It charges a conspiracy

> to * * * defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense.

See, also, *Lutwak* v. *United States*, 344 U.S. 604, 610–613.[5]

We submit that the conspiracy statute, as consistently construed heretofore, authorizes criminal prosecution, under the "fraud" provision, of a course of conduct which amounts to a conspiracy to defraud the United States even if, without proof of fraud, the defendants might also be charged under the "offense" provision. Surely the fact that the prosecutor has chosen to proceed under the portion of the statute which requires more rigorous proof—*i.e.*, proof that actual fraud was intended—should not call for dismissal of the indictment. In the present case, as in *Manton, Glasser* and *Lutwak*, the substantive offenses which were committed were merely "a way of consummating the conspiracy," the overriding objective of which was fraudulently to obtain compliance status and the accompanying benefits of such status for Mine-Mill.

At the heart of petitioners' contention is a misunderstanding of the charge made in the indictment. The conspiracy alleged did not have as its sole object the filing of false affidavits, nor was it successfully terminated when one or more affidavits were filed. As

[5] See generally Goldstein, *Conspiracy To Defraud the United States*, 68 Yale L.J. 405, 436–441 (1959), and particularly the authorities cited in notes 108–113.

the district court observed (R. 9), the indictment alleged that the conspiracy had three parts: (1) the filing of the false affidavits, (2) the fraudulent inducement of the NLRB to issue certificates of compliance, and (3) the use of the fraudulently obtained services and facilities of the Board. While it is true that the first of these objectives amounted to an offense against the United States, the entire course of conduct of which it was a part was more than that. It was precisely what the indictment alleged it to be—a conspiracy "to defraud the United States and an agency thereof" (R. 2).

In arguing the contrary, petitioners rely heavily on *Bridges* v. *United States*, 346 U.S. 209. *Bridges* concerned the question whether an indictment alleging a conspiracy to defraud the United States by making a false statement under oath to a naturalization official was excepted from the operation of the statute of limitations by the Wartime Suspension of Limitations Act. The Act suspended the limitations period "applicable to any offense * * * involving fraud or attempted fraud against the United States or any agency thereof." The Court, noting that the legislative history of the Suspension Act "emphasizes the propriety of its conservative interpretation" (346 U.S. at 216), held that it did not suspend the running of the limitations period with regard to the offense with which the petitioner was there charged. The Court said that notwithstanding the indictment's allegation of fraud against the United States, the charge and the proof supporting it "rely solely on the fact of a conspiracy to commit the substantive offenses

* * * as charged in Counts II and III." 346 U.S. at 223-224.

The *Bridges* decision is inapplicable here for at least two reasons: *First*, the issue before the Court in that case was not, as it is in this case, whether the count of the indictment which charged the defendant with defrauding the United States stated an offense. If the Court had believed that the indictment contained that flaw, it would never have reached the question whether the Suspension of Limitations Act applied to it; the conspiracy count would have been dismissed for failure to charge an offense. The only question in *Bridges* was whether the conspiracy count of the indictment was saved from the operation of the usual statute of limitations by the clause of the Suspension Act which suspended the period for offenses "involving fraud or attempted fraud against the United States." In light of the "conservative interpretation" which the Court deemed appropriate with respect to that Act, it concluded that the conspiracy count did not allege an offense "involving fraud" *within the meaning of the Suspension Act*. Nothing in the Court's opinion lends any support to the notion that the indictment failed to charge the offense of defrauding the United States *within the meaning of the conspiracy statute*. Substantially different considerations govern the decision of these discrete issues.

Second, the relevant count of the indictment in *Bridges* in fact alleged, as the Court observed (346 U.S. at 223–224), no more than a conspiracy to commit the substantive offenses charged in the second and

third counts of the indictment—*i.e.*, making a false statement and obtaining a Certificate of Naturalization by fraud. See Transcript of Record, No. 548, O.T., 1952, pp. 3–8. The indictment in this case alleges more than a conspiracy to file false affidavits. It charges that, with knowledge of the affidavits' falsity, petitioners agreed fraudulently to induce the NLRB to issue a certificate of compliance and thereafter to take advantage of this course of conduct by using the NLRB's facilities. These parts of the conspiracy do not, in and of themselves, constitute statutory offenses, but as we demonstrate below, they amount to a fraud on the United States within the meaning of 18 U.S.C. 371. Hence it cannot be said of this indictment, as it was said of the indictment in *Bridges*, that it "merely cloaks" (346 U.S. at 224) the charge that the defendants conspired to commit a defined statutory offense. This indictment plainly alleged more. As the district court properly observed in rejecting petitioners' claims (R. 14): "The use of allegedly false non-Communist affidavits was only an incident of the conspiracy."*

*There is no substance to petitioners' claim that they were charged with conspiracy to defraud rather than with a conspiracy to commit substantive offenses merely in order to avoid the operation of the statute of limitations (Pet. Br. 15–16). Even if the indictment had been framed in terms of a conspiracy to file false affidavits, the whole sequence of offenses committed pursuant to that conspiracy, including those antedating the limitations period, would have been admissible. See, *e.g.*, *Brown* v. *Elliott*, 225 U.S. 392, 400–401; *United States* v. *Reina*, 242 F. 2d 302 (C.A. 2), certiorari denied, *sub. nom. Moccio* v. *United States*, 354 U.S. 913; *United States* v. *Johnson*, 165 F. 2d 42, 45 (C.A. 3), certiorari denied, 332 U.S. 852; *Huff* v. *United States*, 192 F. 2d 911, 914–915 (C.A. 5), certio-

B. PETITIONERS' CONSPIRACY INVOLVED FRAUD BECAUSE THEY AGREED TO MAKE MATERIAL MISREPRESENTATIONS AND THEREBY OBTAIN SERVICES TO WHICH THEY WERE NOT ENTITLED

This Court defined the offense of conspiracy to defraud in *Hammerschmidt* v. *United States*, 265 U.S. 182, 188, as follows:

> To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention. * * *

The acts alleged to have been committed by petitioners in this case fall squarely within the above definition. The "governmental intention," in furtherance of which Section 9(h) prescribed the filing of non-Communist affidavits, was to discourage unions from electing members of the Communist Party to serve as officers. This Court has recognized that it was Congress' intention to " 'wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional

---

rari denied, 342 U.S. 946; *Culp* v. *United States*, 131 F. 2d 93, 100–101 (C.A. 8). Cf. *Grunewald* v. *United States*, 353 U.S. 391, 396–397. The indictment here was framed in terms of the "fraud" section simply because the conspiracy involved more than the mere filing of false affidavits.

overthrow of our Government'" (*National Labor Relations Board* v. *Highland Park Co.*, 341 U.S. 322, 325) and "to stop the use of the Labor Board by union leaders unwilling to be limited in government by the processes of reason" (*National Labor Relations Board* v. *Dant*, 344 U.S. 375, 385). If the officers of a union had conspired to conceal from the NLRB the existence of an officership in the union occupied by a member of the Communist Party so as to obviate the need of his filing an affidavit (and the remaining officers, being non-Communists, had filed the affidavits required by Section 9(h)), there could be no doubt that they would have conspired to "interfere with or obstruct one of [the government's] lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest" within the meaning of the *Hammerschmidt* decision, *supra*. Indeed, petitioners concede that if they had filed *forged* affidavits, they could unquestionably have been prosecuted for conspiring to defraud the United States (Pet. Br. 18). We submit that when, as here, officers of a union embark on a program of filing false affidavits with the NLRB so as to obtain for the union benefits which would have been unavailable if the filed declarations contained the truth, they have "defeated" the "legitimate official action and purpose * * * by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention." *Hammerschmidt* v. *United States*, 265 U.S. 182, 188.

Petitioners' argument that the Labor Board was not defrauded because it had no power, under *Leedom*

v. *International Union of Mine, Mill & Smelter Workers*, 352 U.S. 145, to look behind the affidavits is based upon an erroneous fragmentized view of the over-all scheme alleged in the indictment and on a misapprehension regarding the purpose of the statute. As we have shown (pp. 14–16, *supra*), the indictment alleged that petitioners had conspired not merely to file false affidavits but to use those affidavits to obtain benefits to which the union was not entitled. Whether or not the NLRB had the power to consider the truth of the affidavits does not bear on the fraudulent character of the entire scheme. The fact is that by using dishonest means—by filing affidavits known to be false—petitioners sought to obtain services to which their union was not entitled. Indeed, in this regard, the NLRB's incapacity to consider the truth of the affidavits renders the fraud even more egregious since it means that petitioners knew that their false statements under oath could not be challenged, and that the bare act of subscribing to and filing a false statement qualified the union for benefits.

Petitioners' claim that the statutory policy of Section 9(h) was "to grant compliance to a union whose officers denied Communist ties, whether those denials were true or false" (Pet. Br. 18–19) obviously distorts the legislative intention. This Court's decision in *Leedom* v. *International Union of Mine, Mill & Smelter Workers*, 352 U.S. 145, rested on no such premise. In that case the Court, looking to the legislative history of Section 9(h), determined that Congress consciously chose not to give the NLRB the power to pass on the truth of the filed affidavits

because "representation proceedings might be indefinitely delayed if the Board was required to investigate the character of all the local and national officers * * *." 352 U.S. at 149, quoting from 2 Leg. Hist., Labor Management Relations Act, 1947, p. 1542. On the basis of this statement, corroborated by Senator Taft's explanation to the Senate (352 U.S. at 150), and by the unfairness of "impos[ing] on a union the drastic penalty of decompliance 'because its officer had deceived the union as well as the Board by filing a false affidavit'" (352 U.S. at 151), this Court held that the Board had not been empowered to examine the truth of affidavits filed under Section 9(h). The fact that it was deemed inconvenient and administratively unsound to impose this burden on the NLRB does not mean that Congress wished to confer the Board's services on unions whose officers filed affidavits, even if the affidavits were false. It was obviously Congress' desire to deny NLRB facilities to such unions, but that could not be accomplished without imposing the undesirable administrative burden on the Board. Consequently, Congress chose the practicable means of enforcing Section 9(h), but it was surely presupposing that those subject to the statute would file truthful statements, not false ones. By conspiring to file untruthful affidavits and to capitalize on the Board's incapacity to look behind them, petitioners were obstructing governmental functions "by deceit, craft or trickery" within the meaning of *Hammerschmidt, supra.*

In *Lutwak* v. *United States,* 344 U.S. 604, 610–613,

this Court sustained a conviction under the "fraud" portion of 18 U.S.C. 371 and held that whether or not the marriages with foreign spouses which were at the heart of the scheme to defraud were valid was immaterial. The Court noted that in passing the War Brides Act, which directed that "alien spouses" of citizen war veterans be admitted into the country, Congress intended to allow in only *bona fide* wives of war veterans and not "to provide aliens with an easy means of circumventing the quota system by false marriages." 344 U.S. at 611. It was not then clear whether the immigration authorities could have refused to allow entry to a legal spouse merely because her intention was to dissolve the marriage after arriving in the United States. Nonetheless, the fact that deception had been practiced to defeat the purpose of an Act of Congress was held sufficient to render the conspiracy one "to defraud the United States" within the meaning of 18 U.S.C. 371.

C. IF THERE WAS ERROR IN CHARGING PETITIONERS, IT WAS NONPREJUDICIAL

In any event, since the facts alleged in the indictment admittedly stated an offense against the United States, any possible error in its characterization as a conspiracy to defraud rather than a conspiracy to commit an offense would not warrant dismissal of the indictment. The situation is no different from that in which the wrong statute is cited in the indictment—an error which, under the Rules, does not warrant dismissal. See Rule 7(c), F.R. Crim. P.; *Wil-*

liams v. *United States*, 168 U.S. 382, 389; *United States* v. *Hutchinson*, 312 U.S. 219, 229. There was no prejudice here.

The fallacy in petitioners' argument is the assumption that a conspiracy to defraud under 18 U.S.C. 371 is a separate crime from conspiracy to commit an offense. The statute may describe two classes of conspiracies, but it defines only one crime. The conspiracy itself, rather than its objectives, constitutes the crime. *Frohwerk* v. *United States*, 249 U.S. 204, 210; *Braverman* v. *United States*, 317 U.S. 49, 54; *May* v. *United States*, 175 F. 2d 994 (C.A.D.C.), certiorari denied, 338 U.S. 830. All that is required is that the objective of the conspiracy be sufficiently identified to apprise the accused of the charge he must meet. That was clearly done here. Moreover, since there is only one crime of conspiracy, a conviction or acquittal under the instant indictment would protect petitioners from another conspiracy prosecution based on the same facts, whether it is characterized as a conspiracy to commit a crime or to defraud the United States. Thus the indictment met the basic tests for determining validity. It informed petitioners of the charges against them and protected them from double jeopardy. See *United States* v. *Debrow*, 346 U.S. 374, 376; *Hagner* v. *United States*, 285 U.S. 427, 431.

These principles are particularly appropriate here because the offense against the United States which petitioners admit the conspiracy embraced—the filing of false statements in violation of 18 U.S.C. 1001—is itself a species of fraud. The false statement stat-

ute, 18 U.S.C. 1001, was designed to protect the authorized functions of governmental departments and agencies from perversion by means of false and fraudulent statements even if such statements do not result in pecuniary loss. *United States* v. *Gilliland*, 312 U.S. 86, 93; *United States* v. *Bramblett*, 348 U.S. 503.

Petitioners contend that the charge made in the body of indictment was that they conspired to violate 18 U.S.C. 1001, but that the indictment also charged them with fraud—which is not a necessary element for criminal liability under the false statements statute. In this regard, their contention is essentially that conspiracy to violate 18 U.S.C. 1001—which they believe to be the only offense charged in the body of the indictment and proved by the evidence—is a lesser offense included within the greater allegation of conspiracy to defraud the government by means of false non-Communist affidavits. Even if the contention is valid—and for the reasons stated above we believe it is not—petitioners are no more prejudiced than any defendant who is charged with a greater offense and convicted of a lesser included one. Such a conviction is authorized by Rule 31(c), F.R. Crim. P., and has never been seriously questioned.

II

PETITIONERS' CONVICTIONS ARE NOT INVALID ON CONSTITUTIONAL GROUNDS

Petitioners also attack their convictions on constitutional grounds, asserting that Section 9(h) of the National Labor Relations Act is either a bill of

attainder, an infringement upon their First Amendment rights of speech and association, or an overbroad classification which exceeds permissible limits under the Fifth Amendment (Pet. Br. 19–35). The constitutional challenge is unsound for two reasons: *First,* the constitutionality of Section 9(h) has no bearings upon the validity of petitioners' convictions. Even if Congress were not constitutionally permitted to condition the availability of NLRB services on the filing of non-Communist affidavits by union officers, as it did in Section 9(h), officers of affected unions were not, by reason of the statute's enactment, licensed to file *false* affidavits (or conspire to do so) in order to avoid the effect which Section 9(h) had (and was intended to have) on unions whose officers were members of the Communist Party. The appropriate method for challenging the constitutionality of Section 9(h) was that used by the plaintiffs in *American Communications Association* v. *Douds,* 339 U.S. 382, where unions which had refused to comply with the statute instituted proceedings to compel the NLRB to offer its services equally to them. *Second,* Section 9(h) was authoritatively held constitutional in the *Douds* case, and with respect to the constitutional claim which is relevant here the decision was by a vote of five-to-one (three Justices not participating). Petitioners suggest no compelling reason for overruling that decision at the present time.

A. PETITIONERS' CONVICTIONS FOR CONSPIRING TO DEFRAUD THE GOVERNMENT ARE VALID IRRESPECTIVE OF THE CONSTITUTIONALITY OF SECTION 9(H)

The statutory provision which petitioners subject to constitutional attack directed the National Labor Relations Board not to conduct investigations or issue complaints on behalf of any union unless its officers had filed affidavits with the Board stating that they were not members of or affiliated with the Communist Party.[7] If, as petitioners contend, this statute was constitutionally invalid because it constituted a bill of attainder or infringed the guarantees of the First or Fifth Amendment rights, they were entitled to file no affidavits whatever. Their constitutional claim could then have been heard and determined in a suit instituted by the union to obtain the services of the NLRB.

Petitioners were not entitled, however, to use their constitutional challenge as an excuse for filing false affidavits. The posture of their claim in this case is, in this regard, analogous to a claim which might be made by a witness who is prosecuted for giving a false answer to a question to which he could have invoked the constitutional privilege against self-incrimination. It is well settled "that the immunity afforded by the constitutional guarantee [against compulsory self-incrimination] relates to the past and does not endow the person who testifies with a license to commit

[7] This case involves only the "membership" requirement of Section 9(h) and not the "belief" provision. Petitioners were charged with having conspired to file statements which falsely denied membership and affiliation (R. 3). There was no allegation or proof regarding the "belief" portion of the affidavits.

perjury." *Glickstein* v. *United States*, 222 U.S. 139, 142. Whereas the witness may have been constitutionally entitled to refuse to answer and to assert the constitutional privilege in the event contempt proceedings were brought against him, that privilege is not a cognizable defense to a perjury prosecution if he chooses to answer falsely.

The same principle has been applied in other situations in which the options open to the party being compelled to answer are much more limited than the options which petitioners had here. In *United States* v. *Williams*, 341 U.S. 58, 66–69, for example, this Court held that a witness who gives false testimony at a criminal trial on an indictment which is determined on appeal to state no federal offense may be prosecuted for perjury. Obviously the witness in such a case has no truly effective means of testing the court's power to proceed before giving his testimony. If he refuses to testify on the ground that no federal offense is stated in the indictment, he assumes the risk of a contempt sanction, and the trial will likely be over before the issue is authoritatively determined. Petitioners, on the other hand, could have asserted their constitutional claim without filing any affidavits. They are no more entitled to invoke the constitutional contention as a defense to the charge of defrauding the government than could the defendant in the perjury prosecution involved in *Williams*. See, also, *United States* v. *Remington*, 208 F. 2d. 567 (C.A. 2), certiorari denied, 347 U.S. 913.

Even more striking in this regard are the decisions which hold that a prospective defendant who is called

before a grand jury and is not informed of his privilege against self-incrimination may not assert this flaw in the proceedings as a defense to a perjury prosecution for having testified falsely before the grand jury. See *United States* v. *Orta*, 253 F. 2d 312 (C.A. 5), certiorari denied, 357 U.S. 905; *United States* v. *Parker*, 244 F. 2d 943 (C.A. 7), certiorari denied, 355 U.S. 836; cf. *United States* v. *Winter*, 348 F. 2d 204, 208–210 (C.A. 2), certiorari denied, 382 U.S. 955. Although a witness in that position may be unaware of his constitutional privilege not to answer the grand jury's inquiries, it has consistently been held that this circumstance gives him no license to provide false testimony. Where, as here, the person who is asked to file a statement under oath knows that he may make his constitutional challenge without giving any statement whatever, it follows *a fortiori* that his constitutional claim provides no excuse for fraudulent representations.

This rule, which has been consistently followed in a variety of circumstances,[8] is a sound and practical one. It rests on the principle that challenges to the constitutionality of a statute or the lawfulness of a proceeding should be made directly and not by artful

[8] See *Ogden* v. *United States*, 303 F. 2d 724, 731 (C.A. 9); *United States* v. *Barra*, 149 F. 2d 489, 490 (C.A. 2); *United States* v. *Meyer*, 140 F. 2d 652 (C.A. 2); *Boehm* v. *United States*, 123 F. 2d 791 (C.A. 8), certiorari denied, 315 U.S. 800; *Hills* v. *United States*, 97 F. 2d 710, 713 (C.A. 9); *Madden* v. *United States*, 80 F. 2d 672, 674 (C.A. 1); *United States* v. *Schneider*, 45 F. Supp. 848 (E.D. Wis.); cf. *Carter* v. *Texas*, 305 U.S. 557, dismissing appeal from 135 Tex. Crim. 457, 116 S.W. 2d 371.

means which conceal the existence of a constitutional claim behind a false facade. Petitioners in this case filed affidavits which appeared regular on their face; they gave no hint of any underlying constitutional challenge. It was only after the falseness of the affidavits was discovered and prosecution was instituted that petitioners raised their constitutional objection to the statutory requirement that they file affidavits of this sort. A witness who chooses to bypass his constitutional privilege not to answer and responds falsely in the hope that his perjury will not be discovered is not permitted thereafter to retreat to his constitutional guarantee if his gamble fails. Petitioners similarly chose to file false affidavits rather than to assert their constitutional claims by not filing at all. They, like the perjured witness, are not entitled to resurrect their constitutional defenses when their deception is discovered.* To permit them to do so would be to encourage those who have constitutional challenges of this kind to attempt first to defraud or deceive government agencies, possibly at the expense of other innocent parties.

This principle underlies the decisions of this Court in *United States* v. *Kapp*, 302 U.S. 214, and in *Kay* v. *United States*, 303 U.S. 1. In the *Kapp* case the

*The circumstances of this case render it highly probable that petitioners consciously chose to file false affidavits in the hope that they would not be prosecuted rather than to contest the constitutionality of Section 9(h). This Court's decision in *American Communications Association* v. *Douds*, 339 U.S. 382, was rendered in May 1950. Hence petitioners knew as of that time that, barring unforeseen circumstances, their constitutional claims would be summarily rejected by the lower courts.

appellees had been indicted for conspiring to violate the false statements statute in reports made to the Secretary of Agriculture under the Agricultural Adjustment Act of 1933. The district court dismissed the indictment because the Agricultural Adjustment Act had been held unconstitutional by this Court in *United States* v. *Butler*, 297 U.S. 1. Reversing the district court's judgment, this Court said (302 U.S. at 217–218):

> * * * Appellees were not indicted for a conspiracy to violate the Agricultural Adjustment Act but for a conspiracy to violate the statute protecting the United States against frauds. It is cheating the Government at which the statute aims and Congress was entitled to protect the Government against those who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. Such questions cannot be raised by those who make false claims against the Government. * * *

Shortly thereafter, in *Kay* v. *United States*, 303 U.S. 1, the Court unanimously reaffirmed the holding in *Kapp* in reviewing a conviction under a statutory provision imposing criminal liability for false statements submitted to the Home Owners' Loan Corporation. The petitioner in that case, like petitioners here, sought to challenge the constitutionality of the Home Owners' Loan Act of 1933 on review of his conviction. This Court rejected the contention (303 U.S. at 6–7):

> * * * There is no occasion to consider this broad question as petitioner is not entitled to

> raise it. When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.
>
> * * * While the instant case is not one of conspiracy to obtain money from the United States, but one of false statements designed to mislead those acting under authority of the Government, the principle involved is the same [as in the *Kapp* case]. Apart from any question of the validity of the other provisions of the Home Owners' Loan Act, Congress was entitled to secure protection against false and misleading representations while the Act was being administered, and the separability provision of the Act (§ 9) is clearly applicable. * * *

The *Kapp* and *Kay* cases do not turn, as petitioners suggest (Pet. Reply to Government's Opposition, p. 4; Pet. Brief 20, n. 15), on the fact that the defendants in those cases had been attempting fraudulently to obtain benefits or "bounties" under the very statute whose constitutionality they were challenging. Although that circumstance might be a distinguishing feature on the facts of *Kapp* and *Kay*, it was neither adverted to in the opinions of Mr. Chief Justice Hughes in those cases nor has it been deemed an essential element of those decisions by the courts which have subsequently applied the *Kapp* and *Kay* principle in other circumstances. The limited reading which petitioners would give these cases would

surely make them inapplicable to situations such as that of the perjured witness, who obviously is seeking no "bounty." The principle underlying *Kapp* and *Kay* is not, we submit, the well established rule that "[t]he Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits." Brandeis, J., concurring, in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348, quoted in *Fahey* v. *Mallonee*, 332 U.S. 245, 255.[10] It is, rather, that no person, whether or not he is seeking the benefits of a statute, may test its constitutionality by first attempting to evade it by means of false representations and then raising the constitutional claim when his evasion is discovered. That principle applies to this case with as much force as it did to *Kapp* and *Kay;* indeed petitioners here had more of an opportunity to challenge the constitutionality of the statute directly, through the union which they controlled, than did the defendants in *Kapp* and *Kay*. Hence any alleged constitutional infirmity in the statute is unavailable as a basis for reversing their convictions for conspiring to defraud the government.[11]

---

[10] We note that in applying this rule in the *Fahey* case, the Court did not rely upon or cite either *Kapp* or *Kay*.

[11] The Court's order granting certiorari did not, as petitioners contend (Pet. Br. 20, n. 15), foreclose this argument. The Court's order limited the writ of certiorari to the first three questions presented in the petition for a writ of certiorari in the language used by the petition. If, as we contend, the constitutionality of Section 9(h) does not affect the validity of petitioners' convictions, the Court could not decide the second question presented by the petition—*i.e.*, "[w]hether * * * Section 9(h) of the Taft-Hartley Act is constitutional"—without

B. SECTION 9(H) IS NEITHER A BILL OF ATTAINDER NOR AN IMPERMISSIBLE INFRINGEMENT ON FIRST AND FIFTH AMENDMENT LIBERTIES

Petitioners' argument that the Court's decision in *American Communications Association* v. *Douds*, 339 U.S. 382, should be overruled is based principally on the recent decisions in *United States* v. *Brown*, 381 U.S. 437, and in *Aptheker* v. *Secretary of State*, 378 U.S. 500. We submit that neither decision warrants a reevaluation of *Douds*.

1. The statute which this Court invalidated as a bill of attainder in *United States* v. *Brown*, 381 U.S. 437, imposed an absolute prohibition on simultaneous membership in the Communist Party and the holding of union office. Congress had named the Communist Party "in no uncertain terms" and had directed that its members "cannot hold union office without incurring criminal liability." 381 U.S. at 450. This, the Court held, violated the constitutional rule that prohibits the legislature from "specify[ing] the people upon whom the sanction it prescribes is to be levied." 381 U.S. at 461. Section 9(h) did not impose unconditional prohibitions or sanctions of this sort. Whereas Section 504 of the Labor-Management Reporting and Disclosure Act of 1959—which was at issue in the *Brown* case—said, in effect, to members of the Communist Party, "You may not serve as union officers," Section 9(h) of the 1947 Act said, "If you serve as

---

rendering an advisory opinion. Moreover, the phrasing used by a petitioner in presenting an issue to the Court patently cannot preclude a respondent from arguing that the issue is not, in fact, dispositive of the case. Even if certiorari is granted, the Court may determine that the issue is not actually presented.

union officers, your union will be unable to use the facilities of the National Labor Relations Board." The former is a prohibition; the latter was described by this Court in Douds as a "discouragement" (339 U.S. at 402).

We submit that this distinction is relevant to the question whether Section 9(h) constituted a bill of attainder. For it is doubtless true that Congress must often impose restrictions of various kinds on the basis of legislative findings which "specify the people upon whom" (381 U.S. at 461) the restriction is levied.[12] Yet not every such restriction must fall as a bill of attainder. Congress has provided in 28 U.S.C. 458, for example, that "[n]o person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court." While the statute marks out two very definite classes—*i.e.*, judicial officers and their close relatives—it does not impose criminal sanctions upon either. It disqualifies brothers and sisters of judges from holding office in their relatives' court, but that restriction can hardly be deemed the sort of "deprivation" to which the constitutional bill-of-attainder provision applies. Nor, we submit, can it be claimed that the bill-of-attainder clause is violated by 5 U.S.C. 118i, which states, "[n]o officer or employee in the executive branch of the Federal Government, or any agen-

[12] Compare, for example, the legislative findings on which Congress based the "coverage formula" of the Voting Rights Act of 1965 which this Court recently sustained in *South Carolina* v. *Katzenbach*, No. 22 Orig., decided March 7, 1966, pp. 23–25.

cy or department thereof, shall take any active part in political management or in political campaigns." Although federal employees are deprived by the statute of the right to participate in political campaigns, this regulation of their activity is not sufficiently substantial to offend the bill-of-attainder clause. In both of the above instances Congress was obviously concerned with evils which may be caused by persons other than those in the group specifically enumerated in the statute and which are not necessarily produced by all those within the group." Yet in each instance Congress has made a legislative finding which has narrowed the group to which the statutory restriction applies.

We submit that even under the *Brown* decision the nature of the "deprivation" is a material element in determining the statute's constitutionality. Where, as under Section 9(h), the statute imposes no immediate criminal sanction but merely acts as an indirect "discouragement," the effect is more regulatory than punitive, and it is not, therefore, sufficiently substantial to invalidate Congress' legislative determination regarding the scope of the evil.

2. *Aptheker* v. *Secretary of State*, 378 U.S. 500, does not support petitioners' contention that Section

---

"The evils of nepotism may result from a judge's appointment of a second cousin as a clerk of the court but may not be present if a circuit judge's son is assigned to summer duty as a library assistant. Similarly, the impartiality of janitors in federal executive office buildings is not likely to be affected by their active participation in partisan politics; the evil may often be greater if employees of the judicial branch of government engage actively in political campaigns.

9(h) is invalid under the Fifth Amendment. Both *Aptheker* and this case involve a restriction on members of the Communist Party. But in *Aptheker*, it was conceded that the restriction imposed by the statute directly affected "the right to travel * * * protected by the Fifth Amendent" (378 U.S. at 505), and the principal issue was whether the restriction upon this constitutionally protected liberty amounted to "reasonable regulation" (*ibid.*). The parallel freedom involved in this case is the freedom to serve as a union officer—which has never been expressly or impliedly recognized by this or any other court as a constitutionally guaranteed "liberty."

There are, in addition, other differences between this case and *Aptheker*. As this Court noted in *Aptheker*, the statute in that case applied "whether or not the [Communist Party] member actually knows or believes that he is associated with what is deemed to be a 'Communist-action' or 'Communist-front' organization." 378 U.S. 509–510. Section 9(h) obviously applies only to knowing members of the Communist Party. In addition, the statute held invalid in *Aptheker* effectively prohibited foreign travel by Communist Party members irrespective of the purpose of the travel. 378 U.S. at 511–512. Section 9(h) is confined to particularized conduct (union officership) which presents a specific evil (the danger of political strikes). Hence Section 9(h) is "more discriminately tailored to the constitutional liberties of individuals" (378 U.S. at 514) than the passport restriction in *Aptheker*.

It is true that one of the vices of the statute held unconstitutional on its face in *Aptheker* was that it rendered "irrelevant the member's degree of activity in the organization and his commitment to its purpose" (378 U.S. at 510), and the challenged provision in this case is similar, in that respect, to the statute involved in *Aptheker*. But an important element in the *Aptheker* decision was the Court's conclusion that the end which Congress wished to achieve—*i.e.*, to restrict the freedom of Communist agents to travel abroad and act as couriers for ventures in espionage or sabotage—could have been achieved by considering membership in the Communist Party not as an absolute disqualification but "one factor to be weighed" (378 U.S. at 513) in the passport screening process—as in federal employment. There is no similar administrative process, however, for evaluating the danger which candidates for union office may present to this nation's industry and commerce. The governing statute, therefore, had to incorporate a self-executing standard if it were not to impose on the National Labor Relations Board the task of evaluating how serious a danger of political strikes was posed by any particular union officer. The Board is obviously unequipped to make that decision, and we submit that the Constitution did not require Congress to assign it any such task. Congress acted reasonably and properly in this area by making membership alone the touchstone.

III

THE DISTRICT COURT'S RULINGS ON PETITIONERS' MOTIONS REGARDING WITNESSES' GRAND JURY TESTIMONY DID NOT CONSTITUTE REVERSIBLE ERROR

Petitioners contend (Pet. Br. 36–53) that the district court committed reversible error in refusing to turn over to the defense or to make an *in camera* inspection of the grand jury testimony of four of the eight government witnesses who testified at petitioners' second trial. The court of appeals agreed that the district court had "the inescapable duty * * * to lift the lid of secrecy on grand jury proceedings in aid of the search for truth" and that its obligation was "not [to] hesitate to inspect and to disclose any inconsistencies if it is likely to aid the fair administration of criminal justice through proper cross-examination and impeachment" (R. 396). On these premises the court concluded that, although "it would have been safer to have inspected the grand jury testimony," the trial court's rulings did not amount to reversible error because "the witnesses were thoroughly and competently cross-examined on numerous other relevant judicial and extra-judicial statements without manifest inconsistency." It was, therefore, "safe to assume that the grand jury proceedings would not have disclosed anything of impeaching significance" (*ibid.*). The court of appeals' conclusion was, we believe, a reasonable one in light of the particular circumstances of this case.

A. DEFENDANTS HAVE NO ABSOLUTE RIGHT TO EXAMINE A WITNESS' GRAND JURY TESTIMONY

In *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, at the conclusion of the testimony of a key government witness, the defense requested access to that portion of his grand jury testimony which related to the subject matter of his trial testimony. The trial judge denied this request. This Court sustained the action of the trial judge and rejected the argument that statements made in grand jury proceedings were no different from other out-of-court statements and were, therefore, controlled by the principles of *Jencks* v. *United States*, 353 U.S. 657. The Court observed that Rule 6(e) of the Federal Rules of Criminal Procedure had committed the disclosure of grand jury minutes to the discretion of the trial court in accordance with the traditional policy of grand jury secrecy. It explained this policy (360 U.S. at 399–400):

> "* * * [T]he American grand jury, like that of England, 'has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor.' *Ibid.* Indeed, indictments may be returned on hearsay, or for that matter, even on the knowledge of the grand jurors themselves. *Id.*, at 362, 363. To make public any part of its proceedings would inevitably detract from its efficacy. Grand jurors would not act with that independence required of an accusatory and inquisitorial body. Moreover, not only would the participation of the jurors be curtailed, but testimony would be parsimonious if

> each witness knew that his testimony would soon be in the hands of the accused. * * *

In concluding that grand jury minutes must be made available to the defense only if the interests of justice require a disclosure in the particular circumstances, this Court held that the defense had not met its burden of showing a "particularized need" for the minutes in cross-examining the witness. The Court did not, however, decide whether the trial judge was required to make an *in camera* inspection of the witness' grand jury testimony if requested to do so in order to determine whether the minutes should be given to the defense.

There is, we submit, no reason to re-examine the *Pittsburgh Plate Glass* decision at this time (Pet. Br. 50–53). The reasons for grand jury secrecy elaborated in that opinion of the Court—than grand jurors would be deterred from participating and witnesses would be reluctant to testify freely—certainly warrant different treatment for grand jury testimony than for extrajudicial statements given by witnesses to government agents. In addition, the legislative history of the Jencks Act (18 U.S.C. 3500) demonstrates that Congress was vigorously opposed to the mechanical disclosure of grand jury minutes which would result from the overruling of *Pittsburgh Plate Glass*. The Senate Report on the bill which became 18 U.S.C. 3500 sharply criticized the decision (*United States* v. *Rosenberg*, 245 F. 2d 870 (C.A. 3)) in which such production had been ordered. See S. Rep. No. 981, 85th Cong., 1st Sess., pp. 3, 10; 103 Cong. Rec. 15933. This recent expression of legislative judg-

ment suggests that if the cloak of secrecy covering grand jury minutes is to be reexamined it should be done by an amendment to the Rules of Criminal Procedure, which would be subject to congressional approval, rather than by an overruling decision of this Court. See *United States* v. *Isthmian S. S. Co.*, 359 U.S. 314, 323. Significantly, in entering an order on February 28, 1966, amending the Rules of Criminal Procedure, this Court modified Rule 6(e) but left unchanged the discretionary power of the trial court regarding the secrecy of grand jury proceedings.[14]

In view of the general rule of secrecy which, under Rule 6(e) of the Federal Criminal Procedure, is to be breached only at the direction of the court in a judicial proceeding, it should be the rare exception when a district judge directs the delivery of a witness' grand jury testimony without having examined it *in camera*. That procedure may be appropriate if the attorney for the government affirmatively represents to the court that there is nothing in the grand jury minutes which warrants further secrecy once the witness has testified. It might also be appropriate if the witness admits on cross-examination that his testimony in open court is materially different from the testimony he gave before the grand jury. In that case, there is no need for the court to determine whether inconsistencies exist, although it remains the court's function to select the portion of the witness' grand jury testimony which relates to his testimony

[14] The amended rules now specifically provide for pretrial production of the recorded testimony of a defendant before the grand jury. Rule 16(a).

at trial. In the usual case, however, the policy that grand jury minutes are secret requires the judge to make a particularized evaluation before he delivers the transcript to the defense.

B. WHETHER TO EXAMINE GRAND JURY MINUTES "IN CAMERA" IS A DISCRETIONARY DECISION TO BE MADE BY THE TRIAL COURT ON AN EVALUATION OF ALL THE CIRCUMSTANCES

Although we agree with the court of appeals that it is the "safer" course for a district judge to examine a witness' grand jury testimony *in camera* on an appropriate request by defense counsel, we do not believe that there is an unqualified legal obligation upon him to do so.[15] As Judge Sobeloff observed in the court of appeals' consideration of the *Pittsburgh Plate Glass* case (260 F. 2d 397, 404 (C.A. 4)):

> Even inspection by the trial judge, it must be recognized, has serious drawbacks. It would cast a heavy burden on the trial judge and seriously interrupt the trial for the Judge to attempt to ferret out inconsistencies in a lengthy transcript; he may not be able readily to absorb and evaluate every nuance in an extensive transcript. A further objection is that imposing this task on the Judge as regular procedure would draw him too deeply into the partisan task of preparing the cross-examination. From time to time instances may arise in which it

[15] We recognize that the rule requested by petitioners—that the trial court is obliged to examine grand jury minutes *in camera* whenever request is made by the defense—is the rule in the Second Circuit. See *United States* v. *Giampa*, 290 F. 2d 83 (C.A. 2). It has not been followed in other circuits, however (see Pet. Br. 48, n. 50), and we believe that it casts an unwarranted burden on the district courts.

> will appear to the Judge wise and just to read the transcript to check a particular point sharply in issue, but the minute examination, during the trial of elaborate grand jury minutes should not be expected of him.
>
> After all, what we are dealing with is a problem of the fair scope of cross-examination, and the sound judicial discretion of the trial judge must be the chief guide. When the subject matter is one as delicate as grand jury testimony, no fixed rule can be formulated. The Judge should not be compelled to inspect in all cases; neither should he indiscriminately refuse, but he should exercise his judgment according to the circumstances.

Various factors should appropriately enter into a district judge's decision whether or not to examine grand jury testimony *in camera*. Among them are the nature and significance of the witness' testimony and the likelihood that grand jury testimony could be of use to the defense. With respect to the latter consideration, it is appropriate to place some burden on defense counsel to state why disclosure should be made. This does not, of course, mean, as the Court emphasized in *Pittsburgh Plate Glass*, that a preliminary showing of inconsistency between the trial and grand jury testimony is necessary. It does mean, however, that a formal blanket demand couched in general terms should normally be inadequate. The defense should have the burden of showing that a real need exists, and this requires it to use such materials as are available to explain the need to the court. Thus, if other testimony or documents at the trial or

prior statements cast doubt on the veracity of the witness, this should be called to the attention of the trial judge. When such materials are available, it is reasonable to require the defense to use them to indicate how they bear on the issue of production. In other words, a defendant represented by counsel is under a duty to make some effort to show the court that his demand for grand jury minutes is a serious one, and not merely a *pro forma* motion made in the hope that, if denied, it will be available as reversible error on appeal. We believe that in this case petitioners failed adequately to support their motions for *in camera* inspection.

C. IN THE CIRCUMSTANCES OF THIS CASE, THE JUDGE'S REFUSAL TO EXAMINE THE GRAND JURY MINUTES "*IN CAMERA*" WAS NOT ERROR

The full record regarding the trial judge's rulings on the motions to produce grand jury minutes shows that the requests were made in a generalized manner and that petitioners actually possessed a large number of extrajudicial statements by the witnesses which could have been used in cross-examination if they had demonstrated inconsistencies. The record also establishes that the trial judge advised defense counsel that if a more substantial showing of need were made, he would be prepared to read the minutes *in camera*. In this Court petitioners have set out in great detail exactly why the trial testimony of the four government witnesses involved was "suspect" and how inconsistencies in the grand jury testimony might have significantly discredited them (Pet. Br. 39–45).

The district court never had the benefit of this particularized analysis, although it seems highly probable from the district judge's statements that he would have read the grand jury testimony if such a showing had been made to him.

1. *Ralph Locke.* The government's first witness at this trial was Ralph Locke, who testified about incidents occuring prior to the formation of the conspiracy. He disclosed that in April 1948 Eckert, a board member of the union, had been discharged after urging that non-Communist affidavits be filed by the union and that he was replaced by petitioner Dichter (R. 35–48). The defense was furnished with a copy of a signed statement given by Locke to the F.B.I. on March 20, 1955 (R. 74–75). They also had his testimony before the Subversive Activities Control Board in 1957 (Tr. 67) and his first trial testimony in 1959 (R. 87).

At the conclusion of Locke's direct testimony, defense counsel sought production of all of Locke's 1956 grand jury testimony and asked, alternatively, that the Court examine the testimony *in camera.* Petitioners' counsel asserted that there was a "probability" of inconsistency and that there was a "particularized need for scrutiny" supported "by the fact that the testimony deals almost entirely with alleged declarations by one or more of the defendants; that the contents of these declarations are uncorroborated by other witnesses so far as we know * * *; that the specific wording of these declarations may be of considerable importance in determining their weight, and, furthermore, that there is inconsistency between the

testimony given on this occasion and the testimony given at the prior trial" (R. 64). Government counsel responded that the defense had not shown any particularized need "but it is a matter that is so much within the discretion of the Court that I don't think we ought to take a position on it one way or the other" (R. 64–65). The court denied the request, pointing out that the court of appeals had sustained its similar ruling at the first trial and that it did "not find any additional showing" of particularized need. The court observed that an *in camera* examination of the minutes would unduly prolong the trial and said, "I am not going to spend my nights reading FBI statements or Grand Jury minutes. I am going to rest, because I am tired after one of these days." The court noted on the following day that no showing had been made "up to this point," but that "[s]hould it develop that such a need is shown to the Court, the Court will examine the minutes in camera and will deliver to the defendants any portions of such minutes as the Court feels they are entitled to under the applicable law" (R. 66).[16]

2. *Bobby Fikes.* Fikes, a member of the Communist Party from 1948 to 1951, rejoined the party following a 1953 request of the F.B.I. and remained a member until 1959 (R. 209). Fikes said that he attended

[16] At this point the court said: " * * * I suggest you retain them; have them available in the event there is any need, as I have suggested for the production of those minutes is shown and the Court will ask you to produce them for the Court's *in cameran* (sic) inspection. That same general ruling would apply, of course, to the testimony of any witnesses who may have testified before the Grand Jury and who testify here, too" (Tr. 109–110).

a meeting in 1949 in Bessemer, Alabama, which was also attended by petitioner Wilson, Alton Lawrence and Jose Hudson, a Communist Party functionary. A subject discussed at the meeting was the union's compliance with Section 9(h) of the Taft-Hartley Act. Fikes testified that Hudson said that union officials were to comply with the Act by resigning from the Communist Party "on paper only." He also testified that petitioner Wilson agreed to comply with this policy (R. 213–217).

The defense had copies of 1953 and 1955 F.B.I. interviews with the witness (R. 267), a 1958 statement (Tr. 531), parts of other F.B.I. reports between 1953 and 1957 containing statements approved by the witness (First Trial Tr. 488–489; R. 209), testimony before the Subversive Activities Control Board (R. 265–266) and the first trial testimony. In requesting production or *in camera* inspection of the grand jury minutes petitioner's counsel stated, "I don't think that we have anything in particular to add to the observations made after our presentation on Mr. Locke, other than it seems to us this case is an even stronger one that the possibility of inconsistencies usable for impeachment purposes is even greater here, that there are apparent inconsistencies between his testimony as given here and given at the previous trial, and, therefore, we would move for the production of the notes" (R. 256). Government counsel took the same position as had been taken with respect to Locke. The court found "there has not been shown a particularized need for the production of the Grand Jury minutes of Mr. Fikes' testimony" (R. 256).

Fikes was not cross-examined until after the completion of the testimony of Alton Lawrence, a defendant who testified for the government following his plea of *nolo contendere* entered prior to the first trial (R. 229, 1). Lawrence, who also testified about the Bessemer meeting with the Communist party functionary (R. 246–250), was not cross-examined (Tr. 476). When petitioners cross-examined Fikes, they did not question him about this meeting (R. 257–268, 270–271). In the course of his cross-examination, Fikes admitted that when he was inducted into the Army he had deliberately lied in answering a questionnaire by saying that he was not a member of the Communist party (R. 258–260). He also admitted that he had been mistaken about dates in other statements he had made (R. 261–263).

The differences between Fikes' and Lawrence's testimony concerning the 1949 Bessemer meeting are the basis of petitioners' principal claim of particularized need in this Court. Petitioner's were aware of these differences, however, after Lawrence's direct examination, but they waived their opportunity to cross-examine Lawrence and chose not to examine Fikes on this subject. Nor did they advise the trial court that inconsistencies now cited between Fikes' and Lawrence's testimony warranted examination of Fikes' grand jury testimony.

3. *Fred Gardner.* Gardner drove Travis across the Canadian border in 1951 and testified about a conversation that they had during the trip. He said, "Travis told me that he was very happy that I had come with Mine-Mill, that the Communist Party

organization in Cleveland had recommended me highly, and we also discussed his resignation from the Communist Party in relation to his problems in crossing the border. He told me that he felt that his resignation was the *case* of a great deal of his problems, because it was a public resignation and it was recognized pretty much as a subterfuge to avoid prosecution under Taft-Hartley and most people accepted the fact that he was still in the Communist party" (R. 281). Petitioners possessed copies of Gardner's testimony at the 1958 retrial of Travis which charged the substantive offense of filing false non-Communist affidavits. They also had copies of his 1960 testimony before the Subversive Activities Control Board (Tr. 632), copies of a 1955 F.B.I. report (Tr. 629) and portions of a March 1956 F.B.I. document concerning the witness (Tr. 625). At the conclusion of Gardner's direct examination defense counsel asked for the minutes, saying "we make our customary demand with respect to the Grand Jury testimony of the witness in 1956" and "our regular motion that we made on Locke, Fikes, Moralez and Mason." The court concluded that "no particularized need has been shown" and denied the request (R. 309–311).

4. *William Mason.* The fourth witness whose grand jury testimony was sought was William Mason, who died before the second trial. At the first trial the trial judge could find no evidence of any "particularized need" for the production of either his 1954 or 1956 grand jury testimony (R. 176, 207). At the second trial, the court permitted Mason's first trial testimony to be read to the jury under the procedure

approved by this Court in *Mattox* v. *United States*, 156 U.S. 237 (R. 91). Petitioners' claim that the first trial testimony was not admissible because they had not had the opportunity to examine Mason with regard to his grand jury testimony was properly rejected.[17]

As in the case of the other witnesses, petitioners had numerous other statements made by Mason. These included May 1954 testimony before the NLRB which covered conversations that Mason had with Travis in 1949 (R. 180–185). See *Leedom* v. *International Union of Mine, Mill & Smelter Workers*, 352 U.S. 145. It also included his testimony at Travis' trials in 1955 and 1958 (R. 180), and statements made in 1954 and 1955 (R. 171). In light of this mass of material, petitioners' generalized demand did not warrant the examination of the minutes of Mason's grand jury testimony.

[17] Petitioner's argument as to Mason is, we believe, an argument of an issue which this Court declined to review when it limited its grant of certiorari. Obviously the trial court could not have erred, at this second trial, in declining to order production of Mason's grand jury testimony for the purpose of cross-examining him. Hence the question with respect to grand jury minutes is the same as Question 5(b) of the petition, which related to allegedly erroneous rulings under 18 U.S.C. 3500 at the first trial with regard to statements made by Mason.

D. IF THIS COURT DISAGREES WITH THE COURT OF APPEALS' EVALUATION OF THE EFFECT OF THE DISTRICT COURT'S RULING, IT SHOULD PERMIT THE DISTRICT JUDGE NOW TO EXAMINE THE GRAND JURY TESTIMONY *"IN CAMERA"*

The court of appeals concluded that the district court's failure to examine the grand jury minutes was not reversible error, and we believe that in the peculiar circumstances of this case that conclusion was sound. On the other hand, we recognize that there is substantial force to petitioners' claims that the interest in secrecy was minimal in light of the oft-repeated testimony of the witnesses and that the arguments they now advance, if made at trial, might have suggested *in camera* inspection as an appropriate course. If this Court determines that these factors, although not presented to the trial court, warrant an examination of the grand jury transcript for inconsistencies, the case should be remanded to the district court for the trial judge's examination of the grand jury minutes.

In *United States* v. *Giampa*, 290 F. 2d 83 (C.A. 2), when the Second Circuit established its rule that the trial court must examine grand jury testimony on demand, it did not reverse the conviction but followed its earlier decision in *United States* v. *Spangelet*, 258 F. 2d 338 (C.A. 2), and ordered the trial judge to examine the grand jury testimony *in camera* and to certify whether there were material inconsistencies. The trial court was also ordered to transmit the sealed grand jury testimony to the court of appeals where his decision could be reviewed. This procedure was followed in *United States* v. *Micele*, 327

F. 2d 222, 226–227 (C.A. 7). See, also, *Campbell* v. *United States*, 365 U.S. 85, 99.

In view of the considerations discussed above, we urge this Court to adopt a similar procedure if it believes that the trial court was under a duty to examine the grand jury testimony. This course is particularly appropriate in a case such as this one where the trial judge indicated that he would examine the minutes if the defense showed a particularized need.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

NATHAN LEWIN,
Assistant to the Solicitor General.

KEVIN T. MARONEY,
GEORGE B. SEARLS,
SIDNEY M. GLAZER,
Attorneys.

APRIL 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

Office-Supreme Court, U.S.
FILED
APR 19 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 502

RAYMOND DENNIS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

TAYLOR, SCOLL, FERENCZ & SIMON,
200 Park Avenue,
New York, N. Y. 10017.

NATHAN WITT,
P. O. Box 156,
New York, N. Y. 10023.

GEORGE J. FRANCIS,
670 Capitol Life Center,
Denver, Colorado 80203.

Attorneys for Petitioners.

TELFORD TAYLOR,
of Counsel.

INDEX

	PAGE
I. Statutory Insufficiency of the Indictment	2
II. Constitutional Insufficiency of the Indictment	4
III. Grand Jury Testimony	10

Citations

CASES:

American Communications Association v. Douds, 339 U. S. 382	9
Aptheker v. Secretary of State, 378 U. S. 500	4
Beohm v. United States, 123 F. 2d 791	8
Bridges v. United States, 346 U. S. 209	2, 3
Brown v. United States, 334 F. 2d 488	5
Brown v. United States, 245 F. 2d 548	6
Brown v. Walker, 161 U. S. 591	6
Cole v. Arkansas, 333 U. S. 196	4
Dennis v. United States, 341 U. S. 494	1
Emery's Case, 107 Mass. 172	6
Glickstein v. United States, 222 U. S. 139	5, 6
Kaye v. United States, 303 U. S. 1	7, 8, 9
Langer v. United States, 76 F. 2d 817	9
Leedom v. International Union of Mine, Mill and Smelter Workers, 352 U. S. 145	3
Madden v. United States, 80 F. 2d 672	9
Ogden v. United States, 303 F. 2d 724	8
Parr v. United States, 265 F. 2d 894	12
Pittsburgh Plate Glass v. United States, 360 U. S. 395	10, 11, 12, 13, 15
Simmons v. United States, 308 F. 2d 324	12
Travis v. United States, 364 U. S. 631	3

PAGE

CASES (Cont'd):

Ullmann v. United States, 350 U. S. 422 6
United Mine Workers v. Gibbs, — U. S. — (Mar. 28, 1966) 4
United States v. Barra, 149 F. 2d 489 8
United States v. Belisle, 107 F. Supp. 283 4
United States v. Brown, 381 U. S. 437 4
United States v. Butler, 297 U. S. 1 7
United States v. Grainger, 346 U. S. 235 2
United States v. Harding, 81 F. 2d 563 9
United States v. Iccardi, 140 F. Supp. 383 ..... 6, 9
United States v. Kapp, 302 U. S. 214 ..... 7, 8, 9
United States v. MacDonald, 10 F. Supp. 948 9
United States v. Meyer, 140 F. 2d 652 8
United States v. Williams, 341 U. S. 58 6
United States v. Winter, 348 F. 2d 204 6

CONSTITUTION, STATUTES AND RULES:

United States Constitution:

First Amendment 5
Fifth Amendment 5

Jencks Act, 18 U. S. C. 3500 ..... 11, 12

18 U. S. C. 371 ..... 2, 3, 4

18 U. S. C. 1001 ..... 2, 7

29 U. S. C. 159(h) (Sec. 9(h) of Taft-Hartley) 1, 3, 4, 5, 7

Federal Rules of Criminal Procedure, Rule 6(e) 12

CONGRESSIONAL MATERIALS:

S. Rep. No. 981, 85th Cong., 1st Sess. 12

IN THE

Supreme Court of the United States

October Term, 1965

No. 502

RAYMOND DENNIS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The principal purpose of this brief is to reply to the government's contention (G. Br. 26-32)[1] that the judgment below may be sustained irrespective of the unconstitutionality of Section 9(h) of the Taft-Hartley law.[2]

---

[1] References to the government's brief are given as above ("G. Br."), to the petitioners' brief as "P. Br.", and to the printed record as "R."

[2] See the prior discussion of this point in our brief (P. Br. 20, n. 15), and in the government's brief in opposition to the petition for certiorari (at pp. 10-13) and our reply thereto (at pp. 3-4). The government contends (G. Br. 32, n. 11) that this argument is not foreclosed by the terms of the Court's order granting certiorari; however that may be, the government's suggestion that the Court cannot here decide the constitutional question "without rendering an advisory opinion" is quite groundless, inasmuch as the Court has on many occasions, by a limited grant of certiorari, excluded non-constitutional questions the resolution of which might have made a disposition of the constitutional questions unnecessary. See, e.g., *Dennis* v. *United States*, 341 U. S. 494, 495-96.

In addition, we comment briefly on the government's arguments addressed to each of the three principal questions included in the Court's order granting certiorari.

I. *Statutory Insufficiency of the Indictment.* The government describes petitioners' argument as based on the premise that the two clauses (i.e., the "offense" clause and the "fraud" clause) of the general conspiracy statute (18 U. S. C. 371) are "mutually exclusive" (G. Br., 13). This is truly remarkable, inasmuch as petitioners' brief is explicitly based on the proposition that the two clauses are *not* mutually exclusive, and that a conspiracy embodying the elements of both clauses (i.e., both statutory offense and fraud) may be charged under either or both clauses (P. Br., 11, 12).

But if the conspiracy as charged embraces the elements of only one of the two clauses, then it must be laid under that clause. In the present case the indictment admittedly charges an offense under 18 U. S. C. 1001 as the unlawful element of the conspiracy; the charge therefore lies under the offense clause, and would also lie under the fraud clause *if* fraud is an essential element of the offense. However, this Court has said and lower courts have held that fraud is *not* an element of that offense, and no doubt that is why petitioners' references (P. Br., 7, 12) to *United States* v. *Grainger*, 346 U. S. 235, 242-43, are greeted by the government with silence.

That it is the substance and not the verbiage of the indictment that governs was established in *Bridges* v. *United States*, 346 U. S. 209, and the government's efforts to distinguish that case (G. Br., 16-17) are futile. Of course it is true that the conspiracy as charged here involved not only filing the false affidavits but also obtaining thereby NLRB certificates of compliance and utilizing the Board's procedures (G. Br., 15). But these "fruits" are of no pertinence to the legal issue; people seldom

make false statements for the pure joy of it. As well might one say that in the *Bridges* case the conspiracy charged in the indictment included (as in fact it did) not only the false statement, but obtaining naturalization as well. The question, as the *Bridges* case makes clear (346 U. S. at 223-24), is not whether fraud is described in the facts as charged, but whether it must be proved as an element of the offense constituting the unlawful element of the conspiracy.[3]

Arguing that the government was defrauded in fact, it is denied (G. Br., 21) ". . . that Congress wished to confer the Board's services on unions whose officers filed affidavits, even if the affidavits were false." But, under Section 9(h) as construed by this Court in *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145, that is just what Congress *did* want; if officers filed false affidavits, the union was to have compliance status and the officers were to be prosecuted for filing false affidavits, as indeed one of these petitioners was. *Travis* v. *United States*, 364 U. S. 631.

Finally, the government argues that the petitioners have not been prejudiced by the insufficiency of the indictment, any more "than any defendant who is charged with a greater offense and convicted of a lesser included one" (G. Br., 24). But the attempted analogy does not fit.[4] Petitioners have been charged with conspiracy to defraud and convicted of conspiracy to defraud under an indict-

---

[3] The district court's comment (R., 14), quoted by the government (G. Br., 17), that ". . . use of allegedly false non-Communist affidavits was only an incident of the conspiracy" is strange at best, for the affidavits' falsity is the only unlawful feature of the facts alleged. Had the affidavits been true, or had none been filed, there would have been no conspiracy whatsoever.

[4] Furthermore, the "offense" clause of 18 U. S. C. 371 is not "included" in the "fraud" clause; each clause involves an element which the other lacks.

ment the allegations of which establish only a conspiracy to commit an offense, as if (to follow out the government's "greater" and "lesser" assumption) a defendant were charged with and convicted of robbery under an indictment the specific allegations of which established only larceny. Indeed, the prejudice[5] in the present case is compounded, for petitioners were convicted of conspiracy to defraud with instructions to the jury under which fraud did not have to be proven (P. Br., 10).[6]

Finally, if one were to indulge the government's erroneous assumption that petitioners' conviction can be regarded as based on the "offense" clause of 18 U. S. C. 371,[7] surely such a conviction, under an indictment plainly charging a conspiracy under the "fraud" clause, would be invalid as lacking in due process of law. *Cole* v. *Arkansas*, 333 U. S. 196.

II. *Constitutional Insufficiency of the Indictment.* The government's arguments in support of the constitutionality of Section 9(h) of the Taft-Hartley law (G. Br. 33-38), based *ex necessitate* on efforts to distinguish *United States* v. *Brown*, 381 U. S. 437, and *Aptheker* v. *Secretary of State*,

---

[5] The other prejudicial factors (P. Br., 16-17) are ignored by the government. For an illustration of a district judge's assessment of the conspiracy under the "fraud" clause as a crime of exceptional gravity, see *United States* v. *Belisle*, 107 F. Supp. 283, 286-87 (W. D. Wash. 1951).

[6] See *United Mine Workers* v. *Gibbs*, — U. S. —, 61 LRRM 2561, 34 L. W. 4335 (Mar. 28, 1966), in which the trial court's failure to instruct the jury that they must find the conspiracy related to "violence and threats of violence", rather than to mere "unlawfulness", was one of the grounds for reversal of the judgment.

[7] The judgments of conviction are explicitly based on "the offense of conspiracy to defraud the government of the United States of America" (R. 23-28).

378 U. S. 500, are half-hearted at best.[8] Faced with the insuperable obstacle of these decisions, the government has shifted its *Schwerpunkt* to the contention that the petitioners, since they are accused of filing false affidavits under Section 9(h), are not entitled to challege the constitutionality of that law (G. Br. 26-32).

The position now taken by the Solicitor General is based on the proposition that the government may put wholly unauthorized questions to a person, and force him to a choice between disclosure of information to which the government is not entitled, or litigation to challenge the validity of the inquiry (G. Br. 32). The dangerous consequences of this proposition are obvious, but apparently not to the Solicitor General.[9]

In support of its argument, the government relies in the first place on an attempted analogy to "a claim which might be made by a witness who is prosecuted for giving a false answer to a question to which he could have invoked the constitutional privilege against self-incrimination" (G. Br. 26). Of course it is true, as the government says (quoting the rule as stated in *Glickstein* v. *United States*, 222 U. S. 139, 142), that waiver of the privilege not to answer confers no license to answer falsely.

But the analogy fails because, in the *Glickstein* situation, the authority to ask the question is incontestable, whereas

---

[8] Concerning attainder, the government's attempted distinction between criminal sanctions and "discouragement" (G. Br. 33-35) finds no support in either the majority or minority opinions in the *Brown* case. Concerning the First and Fifth Amendments, whether or not the right to serve as a union officer (or to vote for one) be of dignity equal to that of the right to travel (G. Br. 36), it is certainly no more susceptible to limitations that infringe First Amendment rights (P. Br. 32-33). See the opinion of the Court of Appeals in the *Brown* case (334 F. 2d 488, at 493-96).

[9] See our reply (p. 4) to the government's brief in opposition to the petition for certiorari, raising questions to which the government remains oblivious.

in the present case that authority is the very point at issue. The privilege against self-incrimination is unrelated to the issue of legal authority to put the question, as has always been recognized;[10] indeed, that is why testimony may be compelled, despite the privilege, if a sufficient immunity is granted.[11] In the *Glickstein* case itself this Court recognized that (222 U. S. at 141): "... the sanction of an oath and the imposition of a punishment for false swearing are inherently a part of the power to compel the giving of testimony...." If that power is lacking—as it is here if the government had no constitutional power to call for the affidavits in which the alleged false statements were made—then the power to punish the falsity is likewise lacking.[12]

---

[10] E.g. *Emery's Case*, 107 Mass. 172, 184 (1871): "It is to be observed that the provision [i.e. the protection against self-incrimination embodied in the twelfth article of the Massachusetts Declaration of Rights] relates to the privileges of the subject, and not to the auhority of any tribunal or body before which inquisition may be made. It places a limit upon all inquiry to which he may be subjected, not by defining the extent of the authority by which it is made, but by surrounding him with a privilege of exemption, which cannot be set aside by any authority without his own consent."

[11] *Ullmann* v. *United States*, 350 U. S. 422; *Brown* v. *Walker*, 161 U. S. 591.

[12] The cases involving perjury before grand juries, where the accused was unaware of his privilege against self-incrimination (G. Br. 27-28), add nothing to the government's argument, for there, too, there was unquestioned authority to put the questions to the witnesses. Nor is *United States* v. *Williams*, 341 U. S. 58, 66-69 (G. Br. 27) any closer to the point, for a defect in the indictment does not deprive the court of its judicial power to hear and determine the case, or its correlative power of testimonial compulsion. If the tribunal totally lacks jurisdiction the result is different, and false testimony is not perjurious. *United States* v. *Williams*, *supra*, at pp. 66-67; *United States* v. *Winter*, 348 F. 2d 204, 210 (C. A. 2d 1965); *Brown* v. *United States*, 245 F. 2d 548 (C. A. 8th 1957) (grand jury); *United States* v. *Iccardi*, 140 F. Supp. 383 (D. D. C. 1956) (Congressional committee). All these cases are so remote from the point here at issue—*i.e.* when the authority to ask the question is challenged—that it is difficult to see why the government troubled

For the second branch of its argument, the government relies on *United States* v. *Kapp*, 302 U. S. 214 and *Kay* v. *United States*, 303 U. S. 1 (G. Br. 29-32) and a handful of comparable decisions in the lower federal courts (G. Br. 28, n. 8). It is true that in these cases (unlike those just previously noted) questions of governmental authority were raised, but they are likewise inapplicable to the present case.

Neither the *Kapp* case nor the *Kay* case involved a challenge to the particular statutory provision under which the sanction for falsity was imposed. Both involved broad challenges to the statutory framework of the operation in which the government was engaged. In the *Kapp* case, the Agricultural Adjustment Act as a whole had been held invalid as beyond the scope of federal power in *United States* v. *Butler*, 297 U. S. 1. In the *Kay* case, as Chief Justice Hughes remarked in his opinion (303 U. S. at 6): "Petitioner's main argument is that the whole scheme of the statute [the Home Owners' Loan Act] is invalid. . . ."

In the present case, on the other hand, petitioners are not challenging the validity of the Taft-Hartley law (or the underlying National Labor Relations Act) as a whole; the challenge[18] is directed specifically and exclusively to Section 9(h), under which the affidavits are required under penalty of union non-compliance and under the incorporated sanction of 18 U. S. C. 1001.

---

to cite them, especially since the offense under 18 U. S. C. 1001 is not technically perjury (no oath, etc.). If treated as perjury, the prosecution here would fail, since the false statements, under the *Leedom* case, *supra*, were not material to any issue that the NLRB was authorized to determine.

[18] It is curious vocabulary that the government uses in complaining that petitioners should not be allowed to "test" the constitutionality of Section 9(h) in this proceeding (G. Br. 28-29, 32). Petitioners, of course, did not seek to "test" anything, and are simply endeavoring to defend themselves against a criminal charge laid under an unconstitutional statutory requirement.

This basic distinction was noted and accepted by the government and acted on by this Court in the *Kay* case itself. In its brief in this Court (No. 991, Oct. Term, 1936, p. 64), the government explicitly disavowed any contention that the defendant was not entitled to challenge the sanction-imposing sections of the Home Owners Loan Act.[14] And this Court acted on the distinction thus suggested, for it declined only to consider the validity of the "other provisions" of that Act authorizing the operations of the Home Owners Loan Corporation, and it *did* consider (and rejected) the defendant's challenge to Section 8(a) of the Act, embodying the sanction (303 U. S. at 7).[15]

Quite apart from the foregoing consideration, however, it is obvious on the fact of the matter that the *Kapp* and *Kay* cases involve sanctions where the defendant went to seek a bounty or benefit from the government, and used a false statement to his own profit, rather than in response to government compulsion or pressure. The government, acknowledging that this is true, attempts to brush this crucial factor aside (G. Br. 31) by suggesting that it was not "adverted to" in the opinions of the Chief Justice in those cases.

But in fact it *was* adverted to, both by the government and the Court. In its brief in the *Kay* case, the government argued explicity No. 991, Oct. Term, 1936, Govt.

---

[14] "It should be noted that we do not argue that petitioner is estopped to challenge the validity of Sections 8(a) and 8(e), under which she was convicted. We urge only that the rule . . . precludes petitioner from assailing the other provisions of the statute, under which she has sought benefits" (Govt. Brief in No. 991, Oct. Term, 1936, at p. 64).

[15] The same distinction is applicable to several of the other cases cited by the government, e.g., *United States* v. *Barra*, 149 F. 2d 489, 490 (C. C. A. 2d); *Boehm* v. *United States*, 123 F. 2d 791 (C. C. A. 8th, 1941); *Ogden* v. *United States*, 303 F. 2d 724, 730-31 (C. A. 9th, 1962); *United States* v. *Meyer*, 140 F. 2d 652 (C. C. A. 2d, 1944).

Brief in Opp. to Cert. at p. 7) that the petitioner had "invoked the statute for purposes of profit to her business and yet seeks now to reject its penal provisions as unconstitutional."[16] In his opinion in the *Kapp* case, Chief Justice Hughes summarized the holding as follows (302 U. S. at 218): "Such questions cannot be raised by those who make false claims against the Government". In support, he cited four lower federal court cases, all of which involved the use of false statements in pursuit of government benefits or bounties.[17]

But the force of the distincton surely does not rest on precedent alone. It is an altogether different situation from those involved in the *Kapp* and *Kay* cases when an individual, seeking nothing from the government, is confronted with an unauthorized and constitutionally invalid demand for information.[18] *Cf. United States* v. *Iccardi*, 140 F. Supp. 383 (D.D.C. 1956).

This country has been passing through periods of intense turbulence and controversy in the field of civil liberties and civil rights. Legislatures and public officials opposed to libertarian trends have been prolific and ingenious in devising governmental machinery to obstruct, harass, and oppress racial minorities and those active in

[16] In its main brief in the *Kay* case (at p. 62) the government distinguished licensing cases where the applicant sought no benefit, and where the statute "merely delimits the freedom to engage in business."

[17] *Langer* v. *United States*, 76 F. 2d 817 (Federal Emergency Relief Act); *Madden* v. *United States*, 80 F. 2d 672 (C. C. A. 1st) (Civil Works Administration); *United States* v. *Harding*, 81 F. 2d 563 (Public Works Administration); *United States* v. *MacDonald*, 10 F. Supp. 948 (Agricultural Adjustment Administration).

[18] There can be no reasonable suggestion that petitioners here were obtaining a "benefit" from the government. As Chief Justice Vinson pointed out in the *Douds* case, 339 U. S. 382, the Taft-Hartley law imposed "a number of restrictions which would not exist if the Board had not been established" (P. Br. 24, n. 22).

behalf of civil rights. Disclosure of identities and financial sources is often a potent weapon for these purposes.

If election officials unlawfully require voter registrants to disclose their race, educational attainments, or other matters, could persons prosecuted for false answers not challenge the validity of the questions? If regular income tax exemptions were made conditional upon a statement that the signatory was not of a particular religious persuasion, could he be prosecuted for making a false response?

No doubt the approved and respectable course, when confronted with informational demands of dubious validity, is to make full disclosure or openly challenge the authority. But many lack the money, time, energy, or will to engage in litigation with the government, yet fear the consequences of disclosure. Under such circumstances, will this Court now say that every man must face the choice in the terms proposed by the government here? The result, we earnestly suggest, would be to lay the basis for oppressive and unlawful inquisitions which many would be or feel helpless to resist.

III. *Grand Jury Testimony.* A. Our opening brief (P. Br. 38-47) argued that the showing of "particularized need" required by *Pittsburgh Plate Glass*, 360 U. S. 395, was made with respect to prosecution witnesses Locke, Fikes, Gardner and Mason,[19] and hence that their relevant

---

[19] The government argues (G. Br. 50, n. 17) that as to Mason, the Court declined to review this issue when it limited its grant of certiorari. "Obviously", says the government (*ibid.*) "the trial court could not have erred, at this second trial, in declining to order production of Mason's grand jury testimony for the purpose of cross-examining him."

Of course, Mason, then dead, could not be cross-examined on the second trial. But we included Mason as one of the witnesses involved in this issue because on the second trial the defense objected to the admission of his first trial testimony on the ground that the denial of the motion for his grand jury testimony on that trial had

grand jury testimony should have been produced directly to the defense. The government makes no reply to our analysis of the criteria of particularized need which appear from *Pittsburgh Plate Glass* or to our demonstration that they were satisfied in this case. Instead, it would have the Court abandon these criteria, repudiate *Pittsburgh Plate Glass*, and permit production directly to the defense only if the prosecutor represents that secrecy is no longer warranted or if the witness admits that "his testimony in open court is materially different from the testimony he gave the grand jury." (G. Br. 41).

The suggestion that prosecutors should be the ones to decide when secrecy is no longer warranted would transfer to them the power now exercised by the district judges under Rule 6(e) of the Rules of Criminal Procedure and would vest in a prosecutor the authority to decide whether the defense should have access to an important source of evidence already available to him.

The proposal that the defense get the minutes only when they are admittedly inconsistent with the witness' direct testimony flies in the face of the statement in *Pittsburgh Plate Glass*, at 400-01, that a showing of inconsistency is not required. Furthermore, the proposal would give the minutes to the defense only when it had no need

---

denied the defense of its full right of cross-examination. This was made clear in our petition for certiorari (p. 13, n. 11; p. 15, n. 16). However, any doubt about the state of the record on this matter is resolved by Rule 40(d)(1) of this Court, which provides that the statement of a question presented "will be deemed to include every subsidiary question fairly comprised therein."

The government also says (*ibid.*) the question with respect to grand jury minutes in Mason's case "is the same as Question 5(b) of the petition", which related to erroneous rulings under 18 U. S. C. 3500 at the first trial with regard to Mason's statements. This is absurd. The Court did deny certiorari on Question 5(b), so Section 3500 *is* out of the case. But that does not eliminate the discrete question as to grand jury testimony, including Mason's.

for them. (P. Br. 49; *Parr* v. *United States*, 265 F. 2d 894, 903 (C. A. 5th) rev'd on other grounds, 363 U. S. 370; *Simmons* v. *United States*, 308 F. 2d 324, 325-26 (C. A. D. C.)).

B. In our opening brief, we suggested (P. Br. 50-53) that *Pittsburgh Plate Glass* should be reconsidered in light of developments since it was decided and that relevant grand jury testimony of a prosecution witness should be produced to the defense on its request and without any preliminary showing. Instead of meeting our arguments, the government now repeats the contention in its brief in *Pittsburgh Plate Glass* (pp. 35-36) that the legislative history of the Jencks statute shows that Congress was "opposed to the mechanical disclosure of grand jury minutes . . ." (G. Br. 40) and that, therefore, if *Pittsburgh Plate Glass* is to be re-examined, it should be by amendment of the Rules of Criminal Procedure (G. Br. 41). The legislative history in this respect shows only that the *Jencks* statute was intended to have no effect one way or the other on the production of grand jury testimony[20] and neither of the opinions in *Pittsburgh Plate Glass* even felt it necessary to deal with this argument of the government's.

C. As for *in camera* inspection, the government argues (G. Br. 42-42), that the Second Circuit practice of automatic inspection upon a defense request should not be adopted and that the trial judge should have discretion to decide whether to make the inspection. Among the factors to be weighed by him are "the nature and significance of the witness' testimony and the likelihood that

---

[20] The Appendix to the Senate Report to which the government refers (G. Br., 40 states that this is a matter governed by Rule 6(e) of the Rules of Criminal Procedure. S. Report No. 981, 85th Cong., 1st Sess.

grand jury testimony could be of use to the defense." (G. Br. 43.)

Contrary to *Pittsburgh Plate Glass*, then, the government would make "particularized need" the test for *in camera* inspection, not for direct production. Even so, the government agrees with the court of appeals (G. Br. 42) that it would have been "safer" in this case for the district judge to have made the *in camera* inspection and, in fact, speculates (G. Br. 44-45) that he probably would have done so if the petitioners had made the showing to him they have now made to this Court. This speculation rests on the premise that the trial judge indicated a readiness to read the minutes if an adequate showing were made to him (G. Br. 44-46).

This premise is not supported by the record. As we pointed out in our opening brief (P. Br. 52, n. 56), the trial judge exhibited great impatience with the request when made in the case of Locke, the first of the witnesses in question. He did not want the trial stretched out "for three or four months"; if reading the minutes were not "too burdensome or too onerous", he would be willing to read them, but "if I find I have got to read volumes and volumes, I am not going to do it until a higher Court tells me I have to." (R. 65-66)

Furthermore, the showing that the defense made was more than sufficient. To begin with, each of the witnesses was a key witness—an important element of "particularized need" (P. Br. 38). This the trial judge knew anyway from having sat on the first trial when all four witnesses testified. Furthermore, in the cases of both Locke and Fikes, the defense pointed out the possibility of inconsistencies at some length (R. 64, 256). In renewing the motions after Fikes' cross-examination, the defense also referred to his impeachment on cross-examination (R.

309).[21] In any case, after the trial judge had declared that he would not examine the minutes "until a higher Court tells me I have to", the defense had little to gain from further elaboration and argument.

D. The government, in conclusion, concedes in effect that the trial judge should have examined the grand jury testimony of the witnesses, and argues that the Court should not order a new trial but remand for such an examination now (G. Br. 51-52).

The government has made no serious effort to answer the argument of our brief (P. Br. 52-53) that inspection

---

[21] The government recognizes (G. Br., 48) that on cross-examination, Fikes admitted lying on several occasions in the past (P. Br., 43), but says that the defense did not even cross-examine Fikes and Lawrence about the differences in their testimony about the meeting in Bessemer in 1949 involving the petitioner Wilson. Whether the defense employed proper tactics in this regard is beside the point. Equally irrelevant is the emphasis the government places on the differences between Fikes' testimony and Lawrence's. The startling difference was between Fikes and Fikes (P. Br., 42), and this *was* pointed out to the trial judge (R., 256). On the first trial, it was in Wilson's mouth that he placed the most incriminating statement in the case—that the letters of resignation from the Communist Party would be "phoney". On the second, it was a Party official who said that the letters "would be on paper, only", while Wilson said that once they had resigned from the Party, none of the officers of the Union "could have any connection with the Communist Party".

With respect to Gardner, the government's statement of the case gives a demonstration of the need for the grand jury testimony of prosecution witnesses. The government quotes Gardner's testimony that, in 1951, the petitioner Travis said that his resignation from the Party in 1949 "was recognized pretty much as a subterfuge . . ." (G. Br., 7). But we pointed out in our brief (P. Br., 43-44) that in 1958 and 1960, Gardner had given three different versions of what Travis had said in 1951, none of them with incriminating overtones. By limiting its discussion of Gardner's testimony to the only one of the four versions which was incriminating, the government illustrates the need of discovering what version Gardner had given the grand jury in 1956.

of grand jury minutes by the trial judge is not a satisfactory alternative to production directly to the defense. If the Court agrees that direct production was required here either under the standard of *Pittsburgh Plate Glass* or because it should be granted on request, the appropriate disposition of the case will be by a reversal for a new trial.

TAYLOR, SCOLL, FERENCZ & SIMON,
200 Park Avenue,
New York, N. Y. 10017.

NATHAN WITT,
P. O. Box 156,
New York, N. Y. 10023.

GEORGE J. FRANCIS,
670 Capitol Life Center,
Denver, Colorado 80203.
Attorneys for Petitioners.

TELFORD TAYLOR,
of Counsel.

SUPREME COURT OF THE UNITED STATES

No. 502.—October Term, 1965.

Raymond Dennis et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 20, 1966.]

Mr. Justice Fortas delivered the opinion of the Court.

The six petitioners and eight others were indicted in the United States District Court for the District of Colorado on a charge of violating the general conspiracy statute, 18 U. S. C. § 371.[1] The single-count indictment alleged a conspiracy fraudulently to obtain the services of the National Labor Relations Board on behalf of the International Union of Mine, Mill and Smelter Workers, by filing false affidavits in purported satisfaction of the requirements of § 9 (h) of the Taft-Hartley Act. Section 9 (h), which was later repealed,[2] provided that labor unions could not secure Labor Board investigation of employee representation or the issuance of a complaint unless there was on file with the Board so-called

[1] The statute reads: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . ."

[2] Congress substituted for § 9 (h), legislation making it a crime for a Communist Party member to hold office or any other substantial position of employment in any labor union. 73 Stat. 536, 29 U. S. C. § 504 (1964 ed.). See note 9, *infra*. In *United States* v. *Brown*, 381 U. S. 437, this successor statute was held unconstitutional as a bill of attainder.

non-Communist affidavits of each officer of the union and its parent organization. The statute required that these affidavits attest that the officer is not a member of the Communist Party or "affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

Four of the six petitioners—Dennis, Dichter, Travis and Wilson—were officers of the union. Each is alleged to have filed false non-Communist affidavits. Petitioners Sanderson and Skinner were, at relevant times, union members but not officers. They are charged with participation in the conspiracy. All were alleged to be "members of and affiliated with the Communist party."

The indictment was returned in 1956. At the first trial petitioners and others were convicted. On appeal, the Court of Appeals for the Tenth Circuit sustained the validity of the indictment, but reversed the judgments on the ground that prejudicial hearsay evidence had been admitted in evidence. 302 F. 2d 5.

On retrial, the petitioners were again convicted and each was sentenced to three years' imprisonment and fined $2,000. This time, the Court of Appeals affirmed. 346 F. 2d 10. We granted certiorari (382 U. S. 915) limited to three questions:

"1. Whether the indictment states the offense of conspiracy to defraud the United States;

"2. Whether, in the comparative light of *American Communications Assn.* v. *Douds*, 339 U. S. 382, and *United States* v. *Archie Brown*, 381 U. S. 437, Section 9 (h) of the Taft-Hartley Act is constitutional;

"3. Whether the trial court erred in denying petitioners' motion for the production, to the defense or the Court, of grand jury testimony of prosecution witnesses."

Essentially, the Government's case is that, prior to June 1949, the union and the Communist Party opposed compliance with § 9 (h); that in 1949 the Communist Party and the union, as a consequence of discussions participated in by petitioners and others, determined that preservation of the Party's allegedly dominating position in the union, and the union's welfare itself, required that the union officials take steps to secure the Board's services for the union; and that, in order to accomplish this purpose, the union's officers were nominally to resign from the Communist Party and to file the non-Communist affidavits required by § 9 (h). Pursuant to this plan, it is alleged, the union leadership voted to comply with § 9 (h). Those officers who were Party members, including four of the petitioners herein, purported to resign from the Party.[3] They then proceeded, at various dates between August 1949 and February 1955, to file with the Labor Board the required non-Communist affidavits. This action, it is contended, was cynical and fraudulent, and petitioners' affidavits were false. In reality, it is claimed, petitioners' Communist Party affiliations remained unaffected as did the Party's domination of the union's affairs. The union thereafter proceeded, on several occasions, to utilize the Board's services, a privilege which it had obtained as a result of these assertedly fraudulent acts.

I.

We first discuss the question, considered both in the District Court and in the Court of Appeals,[4] whether the

[3] One of the petitioners, Travis, made a public announcement of his resignation. The other officers of the union sent purported letters of resignation from the Party to local Party offices.

[4] The opinion of the District Court sustaining the indictment is reported in *United States* v. *Peraati*, 160 F. Supp. 787 (D. C. D. Colo. 1958). On this issue, the Court of Appeals affirmed. *United States* v. *Dennis*, 302 F. 2d 5 (C. A. 10th Cir. 1960).

indictment properly charged a conspiracy to defraud the United States under 18 U. S. C. § 371. We agree that indictments under the broad language of the general conspiracy statute must be scrutinized carefully as to each of the charged defendants because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable. See *Krulewitch* v. *United States*, 336 U. S. 440, 445–458 (concurring opinion); *United States* v. *Bufalino*, 285 F. 2d 408, 417–418 (C. A. 2d Cir. 1960). But in the present case, we conclude that the indictment for conspiracy was proper as to each of the petitioners.

Four of the petitioners—those who filed the affidavits alleged to be false—presumably could have been indicted for the substantive offense of making false statements as to a "matter within the jurisdiction of" the Board, a violation of 18 U. S. C. § 1001. But the essence of their alleged conduct was not merely the individual filing of false affidavits. It was also the alleged concert of action—the common decision and common activity for a common purpose. The conspiracy was not peripheral or incidental. It lay at the core of the alleged offense. It is the entire conspiracy, and not merely the filing of false affidavits, which is the gravamen of the charge. This conspiratorial program included, as prime factors, not only those who themselves filed the false statements, but others who were equally interested in the conspiratorial purpose and who were directly and culpably involved in the alleged scheme. The Government sought to fasten culpability upon all of the conspirators. The indictment properly charges a conspiracy, and with the required specificity alleges the culpable role of each of the petitioners.

Nor can it be concluded that a conspiracy of the described nature and objective is outside the condemnation of the specific clause of § 371 relied upon in the

indictment, which charges a conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose." It has long been established that this statutory language is not confined to fraud as that term has been defined in the common law. It reaches "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government," *Haas* v. *Henkel*, 216 U. S. 462, 479, quoted in *United States* v. *Johnson*, 383 U. S. 169, 172.[5] See also, *Lutwak* v. *United States*, 344 U. S. 604; *Glasser* v. *United States*, 315 U. S. 60, 66; *Hammerschmidt* v. *United States*, 265 U. S. 182, 188. Cf. Goldstein, Conspiracy to Defraud the United States, 68 Yale L. J. 405, 414–441, 455–458 (1959). In the present case, it is alleged that petitioners, unable to secure for their union the benefit of Labor Board process except by submitting non-Communist affidavits, coldly and deliberately concocted a fraudulent scheme; and in furtherance of that scheme, some of the petitioners did in fact submit false affidavits and the union did thereafter use the Labor Board facilities made available to them. This Court's decisions foreclose the argument that these allegations do not properly charge a conspiracy to defraud the United States.

Petitioners argue, however, that their conduct cannot be considered as fraudulent for purposes of § 371 because the Labor Board is required to certify the compliance of any union whose officers have filed non-Communist affidavits—without regard to the veracity thereof. *Leedom* v. *International Union*, 352 U. S. 145, and *Meat Cutters* v. *Labor Board*, 352 U. S. 153. The claim is that since the Board's action in making its services available to the

[5] In *Johnson*, the allegation that the defendants had conspired to defraud the United States was upheld although they were not charged with "any false statement, misrepresentation or deceit." See *United States* v. *Johnson*, 337 F. 2d 180, 185–186 (C. A. 4th Cir. 1964), aff'd as to that issue, 383 U. S. 169, 172.

union was not and could not lawfully have been predicated upon the truthfulness of the affidavits, the element of reliance is missing and there is no conspiracy to defraud. It is true that Congress, in order to free the Board of the delays that would be attendant upon testing the bona fides of controverted affidavits,[6] did relegate to the criminal law the responsibility for dealing with false filings. This allocation of responsibility relating to the sanctions attached to false affidavits does not alter the character or legal consequences of petitioners' alleged actions. It is beyond argument that Congress unmistakably regarded the filing of truthful affidavits—and not merely affidavits true or false—as of the essence of the privilege of using Board facilities. Congress made this doubly clear by expressly providing that certain criminal statutes, such as 18 U. S. C. § 1001 relating to the filing of false statements, shall be applicable in respect of § 9 (h) affidavits.

The facts are, according to the indictment, that petitioners and their co-conspirators could not have obtained the Board's services and facilities without filing non-Communist affidavits; that the affidavits were submitted as part of a scheme to induce the Board to act; that the Board acted in reliance upon the fact that affidavits were filed; and that these affidavits were false. Within the meaning of § 371, this was a conspiracy to defraud the United States or an agency thereof.

Still another argument is advanced to defeat the indictment. Petitioners submit that this case does not involve a conspiracy to defraud, but rather, under the alternative clause of § 371, a conspiracy to commit the substantive offense of filing false statements in violation of 18 U. S. C. § 1001. It is their contention that *Bridges* v. *United States*, 346 U. S. 209, compels the conclusion

---

[6] See the legislative materials set out in *Leedom* v. *International Union*, 352 U. S., at 149–150.

that a conspiracy to file false statements may not properly be laid under the conspiracy to defraud clause of § 371. *Bridges* is not in point. The decision there did not turn upon construction of § 371. The question before the Court was whether a prosecution, otherwise time-barred, could be revived by reference to the War-time Suspension of Limitations Act, 18 U. S. C. § 3287. The Suspension Act applies to "any offense . . . involving fraud or attempted fraud against the United States or any agency thereof . . . ." The indictment in *Bridges* charged both the filing of false statements and a conspiracy to defraud, in order to obtain a certificate of naturalization.[7] The Court held that the Suspension Act did not apply to these offenses. The Act, the Court ruled, was to be construed narrowly and to be applied "only where the fraud is of a pecuniary nature or at least of a nature concerning property." 346 U. S., at 215. The Court characterized the charge that Bridges and his collaborators had conspired to defraud the United States as a "cloak," the sole purpose of which was to revive a stale prosecution.

In the present case, on the other hand, the allegation as to conspiracy to defraud, as we have discussed, properly reflects the essence of the alleged offense. It does not involve an attempt by prosecutorial sleight of hand to overcome a time bar.[8] The fact that the events in-

[7] The indictment in *Bridges* was in three counts. Two charged substantive violations of false statement provisions of the Nationality Act of 1940, formerly 8 U. S. C. §§ 746 (a)(1) and 746 (a)(5), now 18 U. S. C. §§ 1015 and 1425 (1964 ed.). The third count alleged a conspiracy to defraud the United States or an agency thereof, in violation of 18 U. S. C. § 371.

[8] Petitioners suggest that in this case, too, the Government resorted to the conspiracy to defraud clause of § 371 in order to avoid a time bar. The claim is that this was necessary to bring the 1949 filings (defendant Van Camp, acquitted at trial, made no filings after 1949) within the applicable statute of limitations. But the events of 1949 are properly within the time span of the indictment

clude the filing of false statements does not, in and of itself, make the conspiracy to defraud clause of § 371 unavailable to the prosecution. Cf. *Glasser* v. *United States*, 315 U. S. 60, 66–67; *United States* v. *Manton*, 107 F. 2d 834, 839 (C. A. 2d Cir. 1938), cert. denied, 309 U. S. 664.

We conclude, therefore, that the indictment properly charged a violation of the conspiracy to defraud clause of § 371.

II.

Petitioners next urge that we set aside their convictions on the ground that § 9 (h) of the Taft-Hartley Act is unconstitutional. In particular, they rely upon *United States* v. *Brown*, 381 U. S. 437, in which the Court held unconstitutional as a bill of attainder the statute enacted by Congress in 1959 to replace § 9 (h). The new statute made it a crime for a member of the Communist Party to hold office or any other substantial employment in a labor union.[9] They contend that *Brown* in effect over-

---

and provable at trial, not because it charges a conspiracy to defraud, but because it charges a conspiracy, and because at least one overt act is alleged to fall within the applicable period. See *Grunewald* v. *United States*, 353 U. S. 391, 396–397; *Piswick* v. *United States*, 329 U. S. 211, 216; *Brown* v. *Elliot*, 225 U. S. 392, 400–401. Had the indictment charged a conspiracy to violate § 1001—which charge would be unaffected by *Bridges*—the same result would obtain; that is, the Government was enabled to reach back to 1949 by reason of the conspiracy charge. Whether it charged a conspiracy to commit an offense or one to defraud is immaterial for this purpose. Unlike the situation in *Bridges*, the Government here secured no advantage with respect to limitations by charging under one clause of § 371 rather than the other.

[9] The statute, 73 Stat. 536, 29 U. S. C. § 504 (1964 ed.), provides: "(a) No person who is or has been a member of the Communist Party . . . shall serve—

"(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclu-

ruled *American Communications Assn.* v. *Douds*, 339 U. S. 382, which sustained the validity of § 9 (h), and they ask that we now reconsider *Douds*.[10]

We need not reach this question, for petitioners are in no position to attack the constitutionality of § 9 (h). They were indicted for an alleged conspiracy, cynical and fraudulent, to circumvent the statute. Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. This is not such a case. The indictment here alleges an effort to circumvent the law and not to challenge it—a purported compliance with the statute designed to avoid the courts, not to invoke their jurisdiction.[11]

---

sively clerical or custodial duties) of any labor organization . . . during or for five years after the termination of his membership in the Communist Party . . . .

"(b) Any person who wilfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both."

[10] Petitioners also rely upon *Aptheker* v. *Secretary of State*, 378 U. S. 500, where the Court invalidated a statute denying passports to members of any Communist organization.

[11] We note that petitioners are alleged to have entered upon the conspiracy and to have filed the first set of false affidavits during the pendency in this Court of a case raising precisely the constitutional issue now raised by them. Certiorari was granted in *Douds* on January 17, 1949, *sub nom. United Steelworkers* v. *Labor Board*, 335 U. S. 910. Petitioners are charged with commencing to conspire in June of 1949 and with filing false affidavits in August of 1949. Despite this Court's decision in *Douds*, announced on May 10, 1950 (339 U. S. 382), sustaining the validity of § 9 (h), the indictment charges that petitioner Dennis and one Van Camp signed a Board election agreement less than two weeks later, and in December 1950 new affidavits were filed. In short, petitioners chose not only to evade the statute, but to ignore judicial proceedings likely to clarify their rights and then to flout an adverse decision of this Court. In this context, any claim that it is too burdensome to test these statutes in the courts is not entitled to consideration.

It is no defense to a charge based upon this sort of enterprise that the statutory scheme sought to be evaded is somehow defective. Ample opportunities exist in this country to seek and obtain judicial protection.[13] There is no reason for this Court to consider the constitutionality of a statute at the behest of petitioners who have been indicted for conspiracy by means of falsehood and deceit to circumvent the law which they now seek to challenge. This is the teaching of the cases.

In *Kay* v. *United States*, 303 U. S. 1, this Court upheld a conviction for making false statements in connection with the Home Owners' Loan Act of 1933, without passing upon the claim that the Act was invalid. The Court said, "When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction." 303 U. S., at 6. See also *United States* v. *Kapp*, 302 U. S. 214, involving a false claim for money under the subsequently invalidated Agricultural Adjustment Act of 1933. Analogous are those cases in which prosecutions for perjury have been permitted despite the fact that the trial at which the false testimony was elicited was upon an indictment stating no federal offense (*United States* v. *Williams*, 341 U. S. 58, 65–69); that the testimony was before a grand jury alleged to have been tainted by governmental misconduct (*United States* v. *Remington*, 208 F. 2d 567, 569 (C. A. 2d Cir. 1953), cert. denied, 347 U. S. 913); or that the defendant testified without having been advised of his constitutional rights (*United States* v. *Winter*, 348 F. 2d 204, 208–210 (C. A. 2d Cir. 1965), cert. denied, 382 U. S. 955, and cases cited therein).

[13] Indeed, petitioners' own union successfully prevented the National Labor Relations Board from withholding benefits on the basis of petitioner Travis' allegedly false § 9 (h) affidavit. *Leedom* v. *International Union*, 352 U. S. 145.

Petitioners seek to distinguish these cases on the ground that in the present case the constitutional challenge is to the propriety of the very question—Communist Party membership and affiliation—which petitioners are accused of answering falsely. We regard this distinction as without force. The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional. This is a prosecution directed at petitioners' fraud. It is not an action to enforce the statute claimed to be unconstitutional.

It is argued in dissent, see pp. ——, *post*, that we cannot avoid passing upon petitioners' constitutional claim because it bears upon whether they may be charged with defrauding the Government of a "lawful function." At the time of some of the allegedly fraudulent acts of the conspirators, this Court's decision in *Douds* had been handed down. It was flouted, not overlooked. This position loses sight of the distinction between appropriate and inappropriate ways to challenge acts of government thought to be unconstitutional. Moreover, this view assumes that for purposes of § 371, a governmental function may be said to be "unlawful" even though it is required by statute and carries the fresh imprimatur of this Court. Such a function is not immune to judicial challenge. But, in circumstances like those before us, it may not be circumvented by a course of fraud and falsehood, with the constitutional attack being held for use only if the conspirators are discovered.

Because the claimed invalidity of § 9 (h) would be no defense to the crime of conspiracy charged in this indictment, we find it unnecessary to reconsider *Douds*.

III.

We turn now to petitioners' contention that the trial court committed reversible error by denying their motion to require production for petitioners' examination of the grand jury testimony of four government witnesses.[13] Alternatively, petitioners sought *in camera* inspection by the trial judge to be followed by production to petitioners in the event the judge found inconsistencies between trial testimony and that before the grand jury.

The trial judge denied the motions, made at the conclusion of the direct examination of each of the witnesses, on the ground that no "particularized need" had been shown. See *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, 400. On appeal, the Court of Appeals held that the denial of the motions was not reversible error. The court recognized "the inherent power and the inescapable duty of the trial court to lift the lid of secrecy on grand jury proceedings in aid of the search for truth," and that its obligation was "not [to] hesitate to inspect and to disclose any inconsistencies if it is likely to aid the fair administration of criminal justice through proper cross-examination and impeachment." 346 F. 2d, at 17. It went so far as to express the view that "it would have been safer to have inspected the grand jury testimony." *Id.*, at 18. But because "the witnesses were

---

[13] Three of the witnesses in question testified at the second trial. A fourth, Mason, died in the interval between the two trials. At the first trial, the petitioners had moved for production or *in camera* inspection of his grand jury testimony. This was denied. At the second trial, they objected to use of his testimony at the first trial on the ground that they had not been permitted to examine, or to have the trial judge examine, the transcript of his grand jury testimony. Since the omission to require production of Mason's grand jury testimony with a view to impeachment can no longer be remedied, his trial testimony, under our holding herein, is no longer available to the Government in the event petitioners are retried.

thoroughly and competently cross-examined on numerous other relevant judicial and extra-judicial statements without manifest inconsistency," the court thought it "safe to assume that the grand jury proceedings would not have disclosed anything of impeaching significance." *Ibid.*

In its brief in this Court, the Solicitor General concedes that "there is substantial force to petitioners' claims that the interest in secrecy was minimal in light of the oft-repeated testimony of the witnesses and that the arguments they now advance, if made at trial, might have suggested *in camera* inspection as an appropriate course." Brief for the United States, p. 51. But the Government argues that it was not error for the trial judge to have denied petitioners' motions. With this latter proposition we disagree, and we reverse.

This Court has recognized the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 681. And it has ruled that, when disclosure is permitted, it is to be done "discretely and limitedly." *Id.*, at 683. Accordingly, the Court has refused in a civil case to permit pretrial disclosure of an entire grand jury transcript where the sole basis for discovery was that the transcript had been available to the Government in preparation of its case. *Procter & Gamble, supra.* And, in *Pittsburgh Plate Glass Co.* v. *United States, supra,* the Court sustained a trial court's refusal to order disclosure of a witness' grand jury testimony where the defense made no showing of need, but insisted upon production of the minutes as a matter of right, and where there was "overwhelming" proof of the offense charged without reference to the witness' trial testimony.

In general, however, the Court has confirmed the trial court's power under Rule 6 (e) of the Federal Rules of

Criminal Procedure to direct disclosure of grand jury testimony "preliminarily to or in connection with a judicial proceeding." In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234, the Court acknowledged that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." In *Procter & Gamble, supra*, the Court stated that "problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility . . ." are "cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly." 356 U. S., at 683. And in *Pittsburgh Plate Glass, supra*, where four members of the Court concluded that even on the special facts of that case the witness' grand jury testimony should have been supplied to the defense, the entire Court was agreed that upon a showing of "particularized need" defense counsel might have access to relevant portions of the grand jury testimony of a trial witness, 360 U. S., at 400, 405.[14] In a variety of circumstances, the lower federal courts, too, have made grand jury testimony available to defendants.[15]

These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. This realization is reflected in the enactment of the so-called Jencks Act,

---

[14] Because there had been no request for *in camera* judicial inspection of the grand jury minutes, the Court in *Pittsburgh Plate Glass* did not pass upon the adequacy of that technique for protecting a defendant's interests. 360 U. S., at 401.

[15] See, *e. g.*, *United States* v. *Remington*, 191 F. 2d 246, 250-251 (C. A. 2d Cir. 1951), cert. denied, 343 U. S. 907 (defendant charged with commission of perjury before the grand jury); *Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F. 2d 431 (C. A. 2d Cir. 1963) (use by private plaintiff in antitrust suit of witness' grand jury testimony); and cases cited in note 21, *infra*.

18 U. S. C. § 3500, responding to this Court's decision in *Jencks* v. *United States*, 353 U. S. 657, which makes available to the defense a trial witness' pretrial statements insofar as they relate to his trial testimony.[16] It is also reflected in the expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice.[17]

Certainly in the context of the present case, where the Government concedes that the importance of preserving

---

[16] 18 U. S. C. § 3500 (b) (1964 ed.) reads in part: "After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. . . ." Subsection (e) defines "statement" for purposes of the Act.

[17] See, *e. g.*, the Amendments to Rule 16 of the Federal Rules of Criminal Procedure, approved by this Court on February 28, 1966, and transmitted to Congress, which authorize discovery and inspection of a defendant's own statements, the results of various tests, and the recorded testimony of the defendant before the grand jury (and see the Advisory Committee's Note thereon). See also, cases anticipating this broadening of criminal discovery: for example, *Cicenia* v. *Lagay*, 357 U. S. 504, 511; *United States* v. *Peuce*, 16 F. R. D. 423 (D. C. S. D. N. Y. 1954); *United States* v. *Willis*, 33 F. R. D. 510 (D. C. S. D. N. Y. 1963); *United States* v. *Williams*, 37 F. R. D. 24 (D. C. S. D. N. Y. 1965); *United States* v. *Nolte*, 39 F. R. D. 359 (D. C. N. D. Calif. 1965); *State* v. *Johnson*, 28 N. J. 133, 145 A. 2d 313 (1958); *People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24 (1927).

Among the commentators who have argued in favor of broadening criminal discovery are Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? 1963 Wash. U. L. Q. 279; Traynor, Ground Lost and Found in Criminal Discovery, 39 N. Y. U. L. Rev. 228 (1964); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L. J. 1149 (1960); Note, Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1051–1063 (1961). Of particular relevance to the question of grand jury secrecy are: Sherry, Grand Jury Minutes: The Unreasonable Rule of Secrecy, 48 Va. L. Rev. 668 (1962); and Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455 (1965).

the secrecy of the grand jury minutes is minimal and also admits the persuasiveness of the arguments advanced in favor of disclosure, it cannot fairly be said that the defense has failed to make out a "particularized need." The showing made by petitioners, both in the trial court and here, goes substantially beyond the minimum required by Rule 6 (e) and the prior decisions of this Court.[18] The record shows the following circumstances:

1. The events as to which the testimony in question related occurred between 1948 and 1955. The grand jury testimony was taken in 1956, while these events were relatively fresh. The trial testimony which petitioners seek to compare with the 1956 grand jury testimony was not taken until 1963. Certainly, there was reason to assay the latter testimony, some of which is 15 years after the event, against the much fresher testimony before the grand jury.[19]

2. The motions in question involved the testimony of four of the eight government witnesses. They were key witnesses. The charge could not be proved on the basis of evidence exclusive of that here involved.

3. The testimony of the four witnesses concerned conversations and oral statements made in meetings. It was largely uncorroborated. Where the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all relevant aid which is

---

[18] None of the reasons traditionally advanced to justify nondisclosure of grand jury minutes (see MR. JUSTICE BRENNAN'S dissenting opinion in *Pittsburgh Plate Glass*, 360 U. S., at 405) are significant here. For criticism of the traditional arguments against disclosure, see Brennan, *op. cit. supra*, note 17; Sherry, *op. cit. supra*, note 17; Calkins, *op. cit. supra*, note 17.

[19] "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory." *Jencks* v. *United States*, 353 U. S. 657, 667.

reasonably available to ascertain the precise substance of the statements.

4. Two of the witnesses were accomplices, one of these being also a paid informer. A third had separated from the union and had reasons for hostility toward petitioners.

5. One witness admitted on cross-examination that he had in earlier statements been mistaken about significant dates.

A conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. See, *e. g.*, *United States* v. *Bufalino*, 285 F. 2d 408, 417–418 (C. A. 2d Cir. 1960). In these circumstances, it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact.[39] Exceptions to this are justifiable only by the clearest and most compelling considerations. For this

[39] See, for example, *Alford* v. *United States*, 282 U. S. 687, where this Court reversed a trial court's ruling which deprived defense counsel of an opportunity to inquire into the background of an important government witness; *United States* v. *Andolschek*, 142 F. 2d 503, 506 (C. A. 2d Cir. 1944) (L. Hand, J.), where it was held the Government must produce reports—otherwise privileged—upon which the prosecution was based; *United States* v. *Coplon*, 185 F. 2d 629, 636–639 (C. A. 2d Cir. 1960) (L. Hand, J.), cert. denied, 342 U. S. 920, where the court held that defendants were themselves entitled to examine unlawfully taken tape-recordings of telephone conversations although the trial judge had determined that these recordings had not led the Government to evidence introduced at trial; and *People* v. *Ramistella*, 306 N. Y. 379 (1954), where the court ruled the State could not use evidence of a secret identification on an automobile to prove that the automobile was stolen where it was unwilling to disclose the location of the identification mark to the defense.

reason, we cannot accept the view of the Court of Appeals that it is "safe to assume" no inconsistencies would have come to light if the grand jury testimony had been examined. There is no justification for relying upon "assumption."

In *Pittsburgh Plate Glass, supra,* the Court reserved decision on the question whether *in camera* inspection by the trial judge is an appropriate or satisfactory measure when there is a showing of a "particularized need" for disclosure. 360 U. S., at 401. This procedure, followed by production to defense counsel in the event the trial judge finds inconsistencies, has been adopted in some of the Courts of Appeals. In the Second Circuit it is available as a matter of right.[21] While this practice may be useful in enabling the trial court to rule on a defense motion for production to it of grand jury testimony—and we do not disapprove it for that purpose—it by no means disposes of the matter. Trial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony. In any event, "it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness." *Pittsburgh Plate Glass,* 360 U. S., at 410 (dissenting opinion). Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, how-

[21] *United States* v. *Hernandez,* 290 F. 2d 86 (C. A. 2d Cir. 1961); *United States* v. *Gampia,* 290 F. 2d 83, 85 (C. A. 2d Cir. 1961). Compare *United States* v. *Micele,* 327 F. 2d 222, 226–227 (C. A. 7th Cir. (1964); *Ogden* v. *United States,* 303 F. 2d 724, 741–742 (C. A. 9th Cir. 1962); *United States* v. *Bertucci,* 333 F. 2d 292, 297 (C. A. 3d Cir. 1964); *Berry* v. *United States,* 295 F. 2d 192, 195 (C. A. 8th Cir. 1961).

ever conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.[22] The trial judge's function in this respect is limited to deciding whether a case has been made for production, and to supervise the process: for example, to cause the elimination of extraneous matter and to rule upon applications by the Government for protective orders in unusual situations, such as those involving the Nation's security or clearcut dangers to individuals who are identified by the testimony produced. Cf. Fed. Rule Crim. Proc. 16 (e), as amended in 1966; 18 U. S. C. § 3500 (c).

Because petitioners were entitled to examine the grand jury minutes relating to trial testimony of the four government witnesses, and to do so while those witnesses were available for cross-examination, we reverse the judgment below and remand for a new trial.

It is so ordered.

MR. JUSTICE DOUGLAS, while joining the opinion of MR. JUSTICE BLACK, also joins Part III of the majority opinion.

---

[22] See *Rosenberg* v. *United States*, 360 U. S. 367, 371; *United States* v. *Cotter*, 60 F. 2d 689, 692 (C. A. 2d Cir. 1932) (L. Hand, J.); *United States* v. *Coplon*, 185 F. 2d 629, 636–640 (C. A. 2d Cir. 1950) (L. Hand, J.), cert. denied, 342 U. S. 920.

SUPREME COURT OF THE UNITED STATES

No. 502.—October Term, 1965.

Raymond Dennis et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 20, 1966.]

Mr. Justice Black, with whom Mr. Justice Douglas joins, concurring in part and dissenting in part.

This prosecution, now approaching its second decade and third trial, is a natural offspring of the McCarthy era. For reasons set out in Part III of the Court's opinion I agree that it was reversible error for the trial court to deny petitioner's motion to examine the Grand Jury minutes. While I disagree with the Court's holding that the indictment states facts sufficient to charge the offense of defrauding the United States in violation of 18 U. S. C. § 371, I shall devote my attention in this opinion to the Court's holding that petitioners are "in no position to attack the constitutionality of Section 9 (h)" of the Taft-Hartley Act as a bill of attainder. I believe it is a flat denial of procedural due process of law for this Court to allow these petitioners to be tried for the third time without passing on the validity of § 9 (h).

I.

The indictment charges, as it was compelled to charge in order to show that the offense of conspiring to defraud the Government had been committed, that the petitioners' alleged fraud interfered with "lawful" and "proper" functions of government. Had the indictment failed to charge that the functions obstructed were "lawful" and "proper," it would have been fatally defec-

tive under our prior cases accepted by the Court today which state that an essential element of the crime of defrauding the Government is the obstruction of a "lawful" and "legitimate" governmental function. *United States* v. *Johnson*, 383 U. S. 169, 172; *Glasser* v. *United States*, 315 U. S. 60, 66; *Hammerschmidt* v. *United States*, 265 U. S. 182, 188; *Haas* v. *Henkel*, 216 U. S. 462, 479. Accordingly, in holding that petitioners have no right to challenge § 9 (h), the Court must conclude that even if § 9 (h) is a bill of attainder, petitioners have nevertheless conspired to interfere with some lawful and legitimate function of government. Yet the Court nowhere points out any governmental function that could have been interfered with by the false affidavits except functions performed under § 9 (h) which the Court for purposes of this argument assumes is a bill of attainder. But if the provisions of § 9 (h) requiring non-Communist affidavits constitute a bill of attainder then no requirement of that section and no services performed or refused to be performed under it can constitute either lawful or legitimate functions of government. And surely if § 9 (h) is a bill of attainder, the filing of any non-Communist affidavits under § 9 (h), whether true or false, cannot be said to have interfered with any lawful or legitimate function of the Labor Board. It would indeed be strange if the Court means that it is a lawful and legitimate function of the Government to enforce and carry out in any part a bill of attainder against these petitioners. But if this is what the Court means, then it frustrates the Framers' intention that a bill of attainder must never be given the slightest validity or effect in this free country, either directly or indirectly.

Our Government has not heretofore been thought of as one which sends its citizens to prison without giving them a chance to challenge validity of the laws which are

the very foundation upon which criminal charges against them rest. Yet the Court refuses to allow petitioners to attack § 9 (h) on the ground that "the claimed invalidity of § 9 (h) would be no defense to the crime of conspiracy charged in this indictment. . . ." It is indeed a novel doctrine if the unconstitutionality of a law which forms the very nucleus of a criminal charge cannot be a defense to that charge. Certainly the Court does not deny that violation of the § 9 (h) requirement for non-Communist oaths is an essential if not indeed the only ingredient of the crime for which the Government seeks to place petitioners in jail. The indictment properly charged unlawful compliance with § 9 (h) as an essential element, if indeed not the whole crime laid at petitioners' door. Congress has passed no law which requires the Court to refuse to consider petitioners' challenge to the constitutionality of § 9 (h). Nor are there any prior cases of this Court which require us today to tell citizens that the courts of our land are not open for them to challenge bills of attainder under which they may be sent to prison. The holding is solely and exclusively a new court-made doctrine.

The cases relied on by the majority cannot, in my judgment, properly be stretched to support the Court's holding that petitioners have no right to challenge § 9 (h) as a bill of attainder. In *United States* v. *Kapp*, 302 U. S. 214, relied on by the Court, the defendants conspired through use of false statements to secure benefit payments under the Agricultural Adjustment Act to which they were not entitled under the Act itself. For this they were indicted. At trial they contended that they could not be prosecuted because the Agricultural Adjustment Act had been declared unconstitutional. This Court properly rejected that defense. In that case Kapp was convicted of conspiring to get money out of the Treasury to which he had no possible right whether

the statute was constitutional or unconstitutional. The alleged conspiracy was to defraud the Government of money by people who, under no circumstances, had or could have had any legitimate claim to the money. So also in *Kay* v. *United States*, 303 U. S. 1, as in *Kapp*, the defendants made false statements in order to get benefits from the Government which were not due them whether the Home Owners' Loan Act was constitutional or unconstitutional. In none of the other cases relied on by the Court today do we have the situation present in this case. Here, if § 9 (h) is unconstitutional, petitioners' union has always been entitled to services of the Labor Board before any affidavits were filed, when they were filed, or after they were filed. By filing false affidavits petitioners got for their union no more than it was entitled to if the statute is unconstitutional. In this situation if § 9 (h) is a bill of attainder, the Government has been deprived of nothing and defrauded of nothing.

Let us consider for a moment other similar cases in which efforts might be made to deprive citizens of their right to challenge unconstitutional laws bearing down upon them. For example, what if a State wanted to impose racial or religious qualifications for voting in violation of the Fourteenth and Fifteenth Amendments and that State refused to register people to vote until they had filed affidavits swearing that they were not of a proscribed color or religion. If a person filed a false affidavit under such a law could it be possible that this Court would hold the person had defrauded the State out of something it was entitled to have? Take another example. Article VI of the United States Constitution provides that ". . . no religious Test shall ever be required as a Qualification to any Officer or public Trust under the United States." Suppose Congress should pass a law requiring candidates for public office to make affi-

davits that they do not belong to a particular church and a candidate falsely denies his membership in that church. Is it conceivable that this Court would permit him to be barred from his office and sent to prison on the ground that the Government had been defrauded in its "lawful" and "legitimate" functions? And who would imagine that people under indictment for defrauding the government by making false affidavits required by these unconstitutional acts would be denied in a court of justice the right to challenge such unconstitutional laws? The Court's refusal to allow these petitioners to challenge the constitutionality of § 9 (h), on which the charge against them ultimately rests, is hardly consistent with Madison's view that "independent tribunals of justice . . . will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Congress 439 (1789).

II.

In 1959 Congress repealed § 9 (h) of the Taft-Hartley Act and enacted § 504 of the Labor Management Reporting and Disclosure Act. 73 Stat. 536, 29 U. S. C. § 504 (1964 ed.). Section 504 made it a crime for a member of the Communist Party to serve as an officer of a labor union. Last year this Court in *Brown* v. *United States*, 381 U. S. 437, held § 504 to be an unconstitutional bill of attainder. In doing so, the Court said, "§ 504 was designed to accomplish the same purpose as § 9 (h) but in a more direct and effective way." 381 U. S., at p. 439, n. 2. In this case the Government argues with understandable brevity, feebleness and unpersuasiveness that there is a crucial distinction between § 504, which it has to admit is a bill of attainder, and § 9 (h) which it contends is not. This alleged crucial

distinction amounts to no more than an assertion that the punishment under § 504 is more severe than that under §9 (h). This distinction is hard to grasp and harder to accept. Section 504 made it a crime for a Communist to hold office in a labor union. Section 9 (h) made it just as impossible for a Communist to hold union office, though it reached this result in a different way. Section 9 (h) provided that a union could not receive the services of the Labor Board if the union had any Communist officers and required all union officers to file affidavits stating they were not Communists as a condition of their unions' receiving the Board's services. The practical effect of § 9 (h) was that a union officer who was a Communist was forced either to file a false affidavit, for which he could have been prosecuted, or to give up his office. For this reason the differences between § 9 (h) and § 504 upon which the Government relies are too slight, too insubstantial, and too vaporlike to justify the conclusion that one section is a bill of attainder and the other is not. *Brown* held that § 504 was a bill of attainder because it attainted all Communists and declared them unfit to hold office in a labor union. The heart of the holding in *Brown* was that Communists had been so attainted through legislative findings rather than a due process judicial trial. Section 9 (h) amounts to exactly the same sort of attainder by legislative fiat. It would be a distinct and a quick retreat from *Brown* to hold § 9 (h) is not a bill of attainder though its successor, identical in purpose and practical effect, is a bill of attainder. I am not willing to make this retreat either directly, or indirectly by refusing to face the issue here and now.

Petitioners now face their third trial and possible prison sentences just as though the Court had today upheld § 9 (h). I must say with considerable regret that future historians reporting this case may justifiably draw

an inference that it is the petitioners, whatever may be their offense, and not the Government who have been defrauded. For petitioners, if convicted and sentenced again, unlike the Government, actually will have been deprived of something—their freedom. They will be in jail, having been denied by their Government the right to challenge the constitutionality of § 9 (h) which, when it is challenged, must in my judgment be held to be the constitutionally doubly prohibited freedom-destroying, legislative bill of attainder.